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REPORTS OF CASES

Jul. 26

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY AND SEPTEMBER TERMS, 1913.

VOLUME XCIV.

HARRY C. LINDSAY,

OFFICIAL REPORTER.

PREPARED AND EDITED BY

HENRY P. STODDART,

DEPUTY REPORTER.

LINCOLN, NEB.

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1914.

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BY HARRY C. LINDSAY, REPORTER OF THE SUPREME COURT,

For the benefit of the State of Nebraska.

MAY 7 1914

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS.

JUSTICES.

MANOAH B. REESE, CHIEF JUSTICE.

JOHN B. BARNES, ASSOCIATE JUSTICE.

CHARLES B. LETTON, ASSOCIATE JUSTICE.

WILLIAM B. ROSE, ASSOCIATE JUSTICE.

JACOB FAWCETT, ASSOCIATE JUSTICE.

SAMUEL H. SEDGWICK, ASSOCIATE JUSTICE.

FRANCIS G. HAMER, ASSOCIATE JUSTICE.

OFFICERS.

GRANT G. MARTIN..... Attorney General

GEORGE W. AYRES..... Deputy Attorney General

FRANK E. EDGERION..... Assistant Attorney General

HARRY C. LINDSAY..... Reporter and Clerk

HENRY P. STODDART..... Deputy Reporter

VICTOR SEYMOUR..... Deputy Clerk

JUDICIAL DISTRICTS, AND DISTRICT JUDGES OFFICI- ATING AT THE ISSUANCE OF THIS VOLUME.

NUMBER OF DISTRICT	COUNTIES IN DISTRICT	JUDGES IN DISTRICT	RESIDENCE OF JUDGE
First.....	Johnson, Nemaha, Pawnee and Richardson.	John B. Raper.....	Pawnee City.
Second.....	Cass, Otoe and Sarpy.	James T. Begley. ...	Papillion.
Third.....	Lancaster.....	Albert J. Cornish P. James Cosgrave... Willard E. Stewart...	Lincoln. Lincoln. Lincoln.
Fourth	Burt, Douglas and Wash- ington.	George A. Day..... James P. English.... Lee S. Estelle..... Charles Leslie..... Willie G. Sears..... Abraham L. Sutton.. Alexander C. Troup..	Omaha. Omaha. Omaha. Omaha. Tekamah. South Omaha. Omaha.
Fifth	Butler, Hamilton, Polk, Saunders, Seward and York.	George F. Corcoran.. Edward E. Good....	York. Wahoo.
Sixth	Boone, Colfax, Dodge, Mer- rick, Nance and Platte.	Conrad Hollenbeck.. George H. Thomas...	Fremont. Schuyler.
Seventh.....	Clay, Fillmore, Nuckolls, Saline and Thayer.	Leslie G. Hurd.....	Harvard.
Eighth.....	Cedar, Cuming, Dakota, Dixon, Stanton and Thurston.	Guy T. Graves.....	Pender.
Ninth.....	Antelope, Knox, Madison, Pierce and Wayne.	Anson A. Welch.....	Wayne.
Tenth.....	Adams, Franklin, Harlan, Kearney, Phelps and Webster.	Harry S. Dungan....	Hastings.
Eleventh.....	Blaine, Garfield, Grant, Greeley, Hall, Hooker, Howard, Loup, Thomas, Valley and Wheeler.	James R. Hanna..... James N. Paul.....	Greeley. St. Paul.
Twelfth.....	Buffalo, Custer and Sher- man.	Bruno O. Hostetler...	Kearney.
Thirteenth ..	Arthur, Cheyenne, Dawson, Deuel, Keith, Kimball, Lincoln, Logan and Mc- Pherson.	Hanson M. Grimes...	North Platte.
Fourteenth...	Chase, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Perkins and Red Willow.	Ernest B. Perry.....	Cambridge.
Fifteenth....	Boyd, Holt, Keys Paha and Rock.	B. B. Dickson.....	O'Neill.
Sixteenth....	Brown, Box Butte, Cherry, Dawes, Sheridan and Sioux.	William H. Westover	Bushville.
Seventeenth..	Banner, Garden, Morrill and Scott's Bluff.	Ralph W. Hobart....	Mitchell.
Eighteenth ..	Gage and Jefferson.....	Leander M. Pember- ton.....	Beatrice.

PRACTICING ATTORNEYS.

ADMITTED SINCE THE PUBLICATION OF VOL. XCIII.

BARTH, CHARLES F.

BEAULIEU, L. V.

BURGER, JOSEPH O.

BUSSE, HERBERT R.

BYRD, FRANK J.

CAMPBELL, HENRY H.

CHRISTOFFERSON, GEORGE

COHN, MAX M.

DONOVAN, M. L.

HARRIS, SILAS A.

MCGUCKIN, JAMES T.

MAROWITZ, ARTHUR

PALMER, THOMAS P.

PORTER, JUSTIN E.

PUTNAM, G. P., JR.

QUIGLEY, JAMES C.

REARDON, NEAL DANIEL

RHOADES, HERBERT

SCANDRETT, B. W.

SHERWOOD, J. HARVEY, JR.

THUMMEL, GEORGE B.

WILSON, GEORGE AUGUSTUS

WINN, GEORGE H.

RULES OF THE SUPREME COURT.

In force February 1, 1914.

1. **SITTINGS OF THE COURT.**—The regular public sessions of this court will be held on the first and third Mondays of each month at 9 o'clock A. M., standard time, during each term, except at the beginning of the respective terms, when the first day of the session shall be on Tuesday.

2. **SUBMISSION OF CASES.**—A case shall be regarded as regularly reached for submission at the expiration of the time hereinafter provided for the service and filing of briefs; provided, that if no briefs are filed on or before the day fixed by the clerk as rule day and no extension of time has been granted, the appeal will be dismissed on motion unless good reason is shown for the delay.

3. **CONTINUANCES.**—Cases upon the proposed call may be continued by order made at the next session of the court after such call is issued. The order may be made upon stipulation of the parties, or on motion and notice unless grounds for refusing the same are then presented. No oral argument will be allowed.

When placed upon the final call, cases will not be continued except on motion and for urgent necessity shown.

4. **DEFAULTS.**—Whenever a case is reached and the briefs of the party having the affirmative are not on file, the judgment will be affirmed or the proceedings dismissed, unless otherwise ordered on sufficient showing. When default has been made by the other party and there is due proof of service of process and the briefs of the party holding the affirmative are on file with proof of service thereof within the time provided by Rule 11, he may proceed *ex parte*. The hearing of no case shall be delayed by default of either party in serving or filing briefs. To avoid such result the case will be disposed of as if the delinquent

party's briefs had not been served and filed; provided that the court may under special circumstances and on suitable terms otherwise order.

5. ORDER OF HEARING.—The court, in advance, shall, by order, designate what cases shall be submitted and when, having reference to the order of time in which such cases were originally docketed. Advanced cases and cases in which rehearings shall have been granted will be placed on the call for the sitting of court next following the expiration of the time for serving briefs as provided by the rules.

6. ADVANCEMENT OF CASES.—Criminal cases will stand advanced for hearing without motion. The court will, on motion, which motion shall be submitted without argument, advance for hearing cases which have previously been regularly upon the docket of the court. The court will likewise advance cases within the original concurrent jurisdiction of this court, which have been prosecuted in the district court and brought to this court by appellate proceedings, and will also advance cases in which a case stated has been prepared and filed in accordance with Rule 14. The court may also in its discretion advance other cases if they involve questions of public interest; but this power will not be exercised except in cases of grave import and serious urgency; and may also advance cases where it is apparent that, if not advanced, the litigation may be fruitless.

7. TIME FOR ORAL ARGUMENT.—In the oral argument of a case, the time allowed the parties on each side shall not exceed thirty minutes, unless for special reasons the court shall extend the time. Oral arguments on a motion will be limited to five minutes on a side.

8. MOTIONS.

a. *Notice of.*—Every application for an order in any case shall be in writing, and, except as to motions for a rehearing, shall be granted only upon the filing of such application at least two days before the hearing, together with due proof of service of notice on the adverse party or his attorneys at least three days before the hearing.

b. *Form of.*—The notice herein provided for shall conform to the provisions of section 7726, Revised Statutes 1913, and shall be accompanied by a copy of the motion with copies of all affidavits which are to be used upon the hearing. It may be served by a bailiff of this court, or by any sheriff or constable in this state, or by any person; in the latter case, however, the return must be under oath. Fees for service of said notice shall be allowed and taxed as for the service of summons in proper cases.

c. *Mandamus—Notice.*—In all cases of application to this court for a writ of mandamus, a reasonable notice must be given to the respondent of the time when it will be made, accompanied by a copy of the affidavit on which it is based, unless for special reasons it is otherwise ordered.

d. *For Rehearing.*—All motions for rehearing must be printed and may be filed as of course at any time within forty days from the filing of the opinion or rendition of the judgment of the court in the case. Such motion must specify distinctly the grounds upon which it is based and include the brief in support thereof, which shall be prepared as nearly as possible in accordance with Rules 12 and 13. Fifteen copies must be filed with the clerk. In original cases where the error assigned is that the court erred as to the legal principles involved or in its application of the law to the facts, the foregoing provisions shall apply; but as to all other assignments the motion must be made as provided in section 7884, Revised Statutes 1913, and may be typewritten.

9. *MANDATES.*—No mandate shall issue in any civil case during the time allowed for the filing of a motion for rehearing, or pending the consideration thereof, unless specially ordered by the court, or stipulated by the parties.

10. *TRANSCRIPTS AND BILLS OF EXCEPTIONS.*—The transcript shall contain the final judgment entered in the court below and in addition thereto only those parts of the record necessary to a determination of the case. If any objection is made to the giving or refusing to give any instruction they must all be copied in the transcript. If

no such objection is made they can all be omitted. The appellant shall cause the transcript to be neatly and securely bound, and to be paged at the foot, and the questions in the bill of exceptions to be numbered. He shall also cause marginal notes on each page to be placed on the transcript in their appropriate places, indicating the several pleadings in the case, the exhibits, if any, the rulings of the court, the verdict or special finding, if any. The appellant shall also note on the margin of the transcript all motions and rulings thereon, the instructions given and refused, and shall prepare an index referring to the initial page of each pleading, motion and other paper or ruling in the record, such index to form the first page of the transcript. The bill of exceptions shall be paged at the foot, and shall have an index forming the first page thereof, referring to the initial page of the direct, cross and re-examination of each witness, and of each deposition or other paper or exhibit. Where the evidence is set out by deposition or otherwise, the name of each witness, and whether the examination is direct, cross or redirect, shall be stated at the top or on the margin of each page. All depositions, exhibits or papers contained in the bill must, when practicable, be inserted immediately following the rulings of the court thereon.

11. BRIEFS.

a. *Time of Service.*—At the time of docketing each *civil* case the clerk of this court shall estimate the probable date on which the same will be reached for hearing, and thereupon fix and enter on the appearance docket the time, to be known as Rule Day, within which the plaintiff, appellant or relator shall serve his brief on the opposite party or his attorney of record, which Rule Day shall be not less than ninety days before the date of hearing so estimated by the clerk. Within sixty days after Rule Day or within sixty days after such service the opposite party shall serve his brief on the first party, who may reply thereto within ten days thereafter, at his own expense, except in case of cross-appeal, when costs shall be taxed as usual for the answer brief of cross-appellee.

b. *Criminal Cases.*—In criminal cases the fortieth day after the docketing of the case shall be Rule Day, by which day the plaintiff in error shall serve his brief. The state shall serve its brief in thirty days thereafter.

c. *Advanced Cases.*—In advanced cases Rule Day shall be the thirtieth day after the order of advancement is entered, unless the court shall otherwise order, by which day the appellant shall serve his brief. Appellee shall serve his brief in thirty days thereafter.

d. *When Filed.*—Fifteen copies of each brief so prepared by either party, together with proof of service of the same on the opposite party, shall be filed in the clerk's office before the case is submitted.

e. *On Rehearing.*—Within thirty days after a rehearing has been allowed, the party holding the affirmative may serve a printed brief on the opposite party or his attorney of record, by whom in turn a like brief in answer may be served within thirty days after the service of the first required brief, or after the service of a notice that the party holding the affirmative will stand on his original brief, to which answer brief the first party may reply within ten days at his own expense. Fifteen copies of each brief so prepared and served on rehearing, together with proof of service, shall be filed in the clerk's office before the case is submitted.

f. *Leave to File.*—A party in default for want of briefs shall only be permitted to serve and file them out of time by leave of court upon satisfactory showing of diligence and at his own costs.

12. BRIEFS—HOW PREPARED.

(1) *Appellant's Brief.*—The brief of appellant shall consist of the statement of the case and the propositions of law relied upon, with authorities supporting them.

The statement of the case shall consist of:

(a) The nature of the case.

(b) The issues.

(c) How the issues and case were decided.

(d) The errors relied upon for reversal, with a concise statement, in connection with each point presented, or

separately, as will best present the error relied upon, of the substance of so much of the record as is necessary to present each question to be determined, referring to the pages and paragraphs of the transcript and the page of the bill of exceptions and the number of the interrogatory.

If the insufficiency of the evidence to sustain the verdict or finding of fact or law is assigned, the statement shall contain a concise statement of the substance of the evidence bearing upon the point so presented, referring with particularity by question and page to the evidence in the record supporting the contention made. The statement will be taken to be accurate and sufficient for a full understanding of the questions presented for decision, unless the opposite party in his brief shall deny the correctness or accuracy of the statement, specifying with particularity the defects and inaccuracies therein, with citation of the page and paragraph of the transcript or page and question of the bill of exceptions, as the case may be, relied upon by him in support of his contentions in that regard. Following this statement the brief shall contain the propositions of law relied upon as necessarily involved in the decision of the case; each proposition must be numbered and separately stated, concisely and without argument or elaboration, and authorities relied upon as supporting them must be cited with each proposition, respectively.

Every reference to an adjudicated case shall be by the title thereof, as well as by the volume and page where it may be found, and the particular edition of any text-book referred to must be given in connection with the cited page or section thereof.

(2) *Appellee's Brief.*—The brief of appellee on the assignment of errors shall point out any omissions or inaccuracies in appellant's statement of the record, and shall contain a short and clear statement of the propositions by which counsel seek to meet the allegations of errors and sustain the judgment or decree, or by which such errors are obviated. Following this statement, the brief shall contain the points and authorities relied on, in like manner as required in the appellant's brief. The brief of appellee

on cross-errors shall be prepared in the manner required in the case of appellant's brief. The brief of appellant, in answer to the cross-assignment of errors, shall be prepared in the manner required of appellee in answer to the assignment of errors. Reply briefs shall be prepared in like manner to answer briefs.

(3) *Printed Argument*.—The brief of any party may be followed by an argument in support of such brief, which shall be distinct therefrom, but shall be bound with the same. The argument shall be confined to discussion and elaboration of the points contained in the brief.

13. BRIEFS—HOW PRINTED AND TAXED.

a. *How Printed*.—All briefs shall be printed on good book paper on pages eight inches wide and eleven inches long, small pica type, leaded lines; the printed matter to be four inches wide and seven inches long, with a margin of two inches on each side and end; but the type in which extracts are printed may be small pica solid or brevier leaded. The heading of each brief shall show the title of the case, the county from which the case was brought, the name of the trial judge, the names of counsel filing the brief and shall also indicate in whose behalf the brief is filed.

b. *Cost of Printing*.—When the parties or their attorneys shall furnish their printed briefs and cases stated in conformity to the rules of this court, it shall be the duty of the clerk to tax a printer's fee, at the rate of one dollar for every five hundred words embraced in a single copy of the same, against the unsuccessful party, not furnishing the same, to be collected and paid to the successful party as other costs. *No costs shall be taxed for printing briefs or cases stated unless printed, served and filed in conformity with the foregoing rules.* When unnecessary costs have been made by either party the court will, upon application, order the same to be taxed to the party making them, without reference to the disposition of the case.

14. *CASE STATED*.—The parties may by agreement state the case to be presented to this court on appeal. The case stated shall in plain language briefly recite the facts upon

which the questions of law arise and also any substantial conflict in the evidence as to any fact involved, and separately state and number the rulings of the court complained of, with so much of the record as will fully show the law question involved in such ruling and the exceptions and contentions of the parties thereon. The case stated will in such case constitute the bill of exceptions, and must be allowed and certified by the judge who tried the case, and filed with the clerk pursuant to sections 7880 and 8194, Revised Statutes 1913. The case stated must be printed and bound with appellant's brief. A case so submitted will be advanced for hearing, if both parties desire.

15. SECURITY FOR COSTS.—In each case brought to this court the appellant, plaintiff in error, or relator, shall, before the entry of the same upon the docket, give security for costs by filing a bond in the sum of \$50 with one or more sureties, conditioned for the payment of the costs of this court, which bond must be approved by the clerk of this court. The obligation of the surety shall be complete, simply by indorsing the summons in error or notice of appeal, or by the execution of a formal bond for costs, and such surety shall be bound for the payment of all costs which may be adjudged against the appellant, or relator, whether either of them obtain judgment or not, and after final judgment this court, on motion of the appellee, or respondent, or any other person having a right to such costs, or any part thereof, after ten days' notice of such motion, may enter up judgment in the name of the appellee, or the respondent, or the legal representatives of either, against the surety for costs, his executors, or administrators for the amount of the costs adjudged against the appellant, or the relator, or so much thereof as may remain unpaid, and for accruing costs. Execution may be issued on such judgment, as in other cases, for the use and benefit of the persons entitled to such costs. But these provisions shall not apply in cases where a bond or undertaking has been filed in the court below, in accordance with the provisions of section 8189, Revised Statutes 1913, where such bond is conditioned to pay costs, but in such

cases the transcript filed must show the giving of such bond or undertaking, with the names of the sureties thereon. Besides the security for costs above required to be given when a case is docketed, the party docketing such case shall deposit with the clerk \$10 to cover clerk's costs that may be made by such party in the case; and if the deposit shall at any time be exhausted by the party making the same, the clerk may from time to time require such party to deposit a further sum of \$5. Upon the termination of a case any sum remaining from such deposit not applicable to the clerk's costs incurred by the party making the deposits shall be returned to him.

16. CAPITAL CASES—SUSPENSION OF SENTENCE.—In all criminal cases brought on error to this court, where it appears that the court below has passed sentence of death upon the plaintiff in error, it shall be the duty of the clerk to enter the constitutional suspension of sentence upon the journal, and he shall immediately transmit to the officer charged with the execution of the sentence a certified copy of such suspension.

17. QUESTIONS NOT INVOLVED IN LITIGATION.—Only questions involved in matters of actual litigation before the court will be entertained or judicially determined, and no opinion will be filed in answer to any merely hypothetical question.

18. PRÆCIPE.

a. *On Appeal*.—The party or parties appealing shall file with the transcript a præcipe, which shall state the court from which the appeal is taken, the date of the judgment appealed from, the names of all parties and their relations to the case as they appeared in the court below. The præcipe shall also specify the party or parties appealing, and designate all others made parties to the appeal as appellees.

b. *On Cross-Appeal*.—Coparties of appellants may join in the appeal or take cross-appeal, or any appellee may take cross-appeal, by filing with the clerk of this court, within thirty days before the time fixed as rule day, a præcipe, which shall designate the name of such party as

cross-appellant, and the names of all adverse parties as cross-appellees.

19. NOTICE OF APPEAL.—Upon the filing of said transcript and præcipe, where no notice of appeal has been filed in the district court within ninety days after the rendition of the judgment or decree, the clerk shall issue a notice of appeal, which shall designate as appellants the names of parties joining in the appeal, and as appellees the names of all other parties. It shall also designate the court from which the appeal is taken, the date of judgment appealed from, and separately state the names of the parties plaintiff and the parties defendant, respectively, in the district court. The notice shall be returnable within thirty days after it is issued, and shall be served upon the appellees named therein or their attorney or attorneys of record in the district court. The service shall be made by the sheriff of the county in which the parties or attorneys may be found, and as provided by law for the service of summons in civil actions in the district court. The issuing and service of the notice may be waived by writing, signed by the parties to be served, but neither such waiver nor the filing of notice of appeal in the district court will dispense with the filing of the præcipe.

20. ATTORNEYS OF RECORD BELOW ATTORNEYS IN THIS COURT.—The attorneys of record and guardians *ad litem* of the respective parties in the court below shall be deemed the attorneys and guardians of the same parties, respectively, in this court, until others are retained or appointed and notice thereof served on the adverse party.

RULES FOR ADMISSION OF ATTORNEYS.

1. ADMISSION OF ATTORNEYS: TIME OF EXAMINATION.—Examinations of applicants for admission to the bar will be held on the second Tuesday of June and the third Tuesday of November each year; provided, however, that the commission may hold examinations at such other times and at such places as the commission, or a majority thereof, shall deem advisable, applications of candidates for such examinations being on file with the clerk of this court as provided in Rule 2.

2. APPLICATION AND SHOWING: CERTIFICATE OF SPONSORS.—Each applicant for admission shall, at least four weeks before the day set for examinations, file with the clerk of this court a written request, in his own handwriting and subscribed by himself, for admission, together with his personal affidavit, as to his age, residence and time and place of study, or admission and period of practice in courts of record in another state or a territory, and the certificate or affidavit of at least two citizens of good standing in the community where the applicant resides, or formerly resided, that they are well acquainted with him and that he is of good reputation in that community and that they believe him to be of good moral character.

3. ADMISSION ON EXAMINATION: SHOWING BY APPLICANT AND PRECEPTOR: EDUCATIONAL QUALIFICATIONS: REPUTABLE LAW SCHOOL.—Each applicant for admission upon examination shall, in addition to making the showing set out in Rule 2, make proof by his own affidavit, and by the affidavit or certificate of his preceptor or preceptors, that he has regularly and attentively studied law under his or their personal direction or supervision in a reputable law school or in the office of a practicing attorney, or partly in such school and partly in such office, for a period of at least three years, at least one year of which office study shall have been passed in a law office in this state; provided, also, that each applicant shall prove, either by school, college or teacher's certificate or diploma or in examination before the bar commission, that he has had preliminary education, other than legal, equivalent to that involved in the completion of the first three years of a high school course accredited by the State Department of Public Instruction. A reputable law school within the meaning of the act for admission to the bar is one having a three years' course of study of not less than thirty-four weeks a year, and actually requiring for admission to regular class standing a preliminary education equivalent to a Nebraska high school course of three years, and requiring of each regular class recitation averaging at least ten hours a week. If it be shown by the affidavit of

an applicant that his preceptor is dead, or that for other satisfactory reasons his certificate cannot be obtained, there may be substituted therefor the certificate of any member in good standing of the bar of the county in which the applicant pursued his studies, and who may be personally cognizant of the facts.

4. OTHER PROOF OF CHARACTER AND QUALIFICATIONS OF APPLICANT.—None of the facts required for qualifying an applicant for admission shall be conclusively established by the foregoing proof, but the applicant shall in his application give the names and addresses of at least three (3) persons, other than those whose certificates he presents, of whom inquiry can be made in regard to the applicant's character and other qualifications.

5. PAYMENT AND DISBURSEMENT OF FEES.—The applicant shall also, with his application, deposit with the clerk the sum of five (\$5) dollars. The clerk shall enter all sums so received in a book or account kept for that purpose, showing date and name of applicant, and shall pay the same out on order of the Chief Justice, in payment of the expenses of such examination, and for no other purpose; that is to say, the cost of necessary printing and stationery; to the clerk for each oath and certificate of admission issued to an applicant, \$1.50; to each member of the commission conducting the examination, his necessary traveling expenses, and for personal expenses while actually engaged in the performance of his duties, not exceeding \$5 a day. The secretary shall receive a salary of \$50 per annum.

6. ADMISSION FROM ANOTHER STATE OR A TERRITORY.—Any practicing attorney in the courts of record of another state or a territory, having professional business in either the supreme or district courts of this state, may, on motion to such court, be admitted for the purpose of transacting such business, upon taking the required oath. Any such attorney having become a resident of this state, desiring to be admitted to practice generally in the courts of this state, must make his application as required by these rules and present proof by satisfactory certificate

that he is a licensed practitioner in a court of record of another state or a territory where the requirements for admission when he was admitted were equal to those now prescribed in this state, or, that he has practiced law five full years under license in any state or territory within ten years next preceding the date of his application.

7. REGISTRATION AT COMMENCEMENT OF STUDY: FORM: FAILURE TO REGISTER: CHANGE OF PRECEPTOR: FEE.—The clerk of this court shall keep a register, in which every person applying for admission upon examination as having studied in the office of a practicing attorney in this state must have registered at the beginning of his term of study, unless good cause, other than ignorance of this rule, satisfactory to the commission, be shown to the contrary. Such register shall disclose the name of the student, his residence, and the name and address of the attorney in whose office he is studying. The application for registration shall be in writing and may be formal or informal. In case of change of preceptor or removal from one office to another, such change must be notified to the clerk, who will note it on the register. The clerk may require a fee of fifty cents from every applicant registered.

8. COMMISSION: APPOINTMENT: DUTIES.—The court will, on or before the opening of the September term in each year, appoint a commission, composed of five (5) persons learned in law, to conduct examination for the ensuing year. The commission so appointed shall, prior to the examinations, examine the proofs of qualifications filed in accordance with the foregoing rules, and may make such further investigations as to the qualifications of any applicant as it shall deem expedient. On the day appointed it shall commence the examination of applicants. The method of conducting the examinations shall be left to the discretion of the commission, it being expected that the commission will, in the conduct of such examinations, and in the investigation of the qualifications of applicants, take care that no person shall be recommended for admission who has not in all particulars shown himself to be well qualified.

9. **REPORTS.**—As soon as practicable, after the conclusion of the examination, the commission shall make a written report to the court of its conclusion, and all persons who shall be recommended for admission by a majority of the commissioners shall thereupon be admitted to practice, on taking the oath prescribed by law.

10. **REJECTION OF APPLICANT: FURTHER CERTIFICATE.** If an applicant shall be rejected, he shall not again be admitted to an examination for one year from the time of such rejection, and until he shall file a certificate that he has studied law for one year since his rejection.

11. **GRADUATES OF COLLEGES OF LAW.**—Graduates of the College of Law of the University of Nebraska and Creighton College of Law shall make application and present proofs of qualifications in the same manner as other applicants. If found otherwise qualified by the commission, they shall be admitted without examination.

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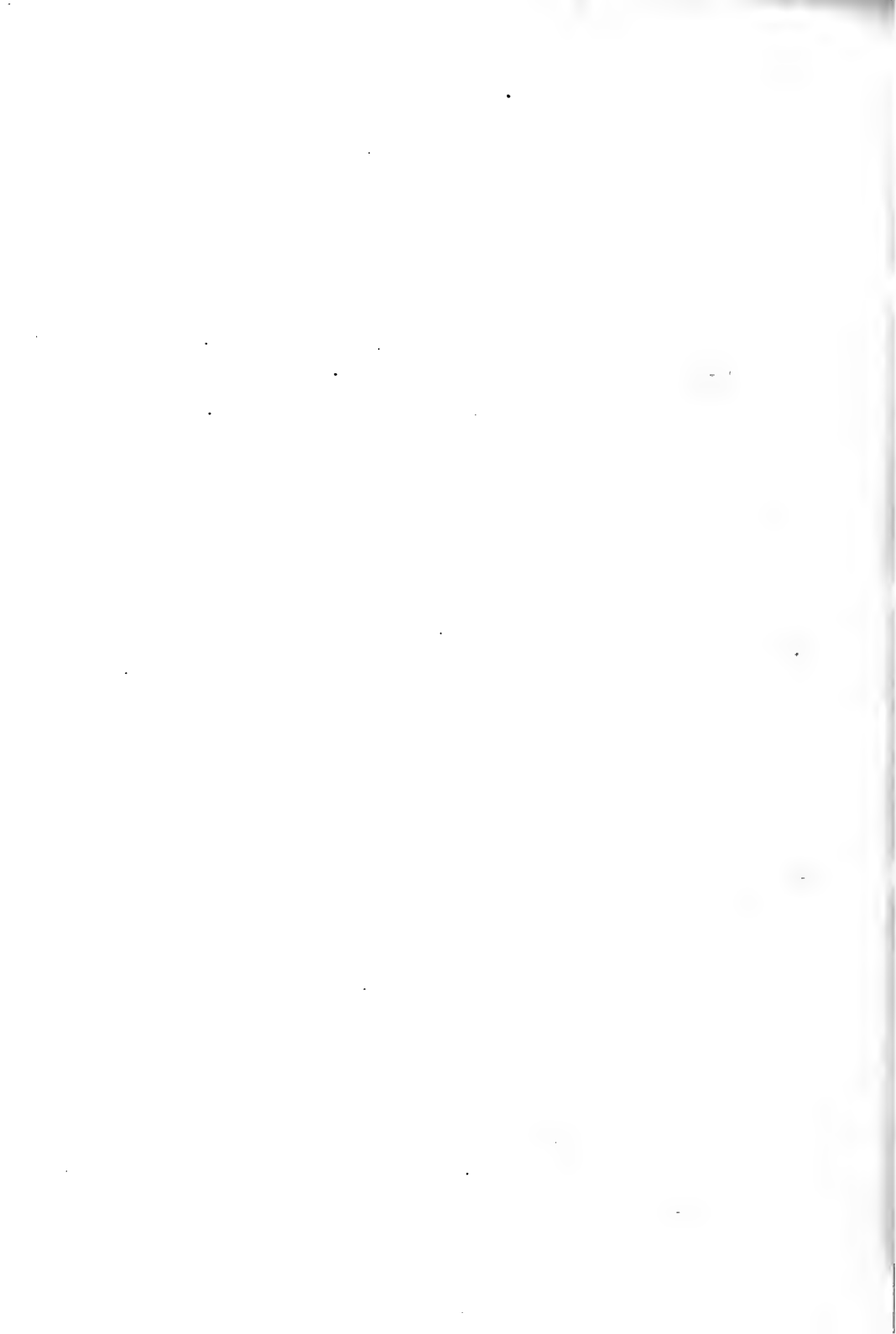
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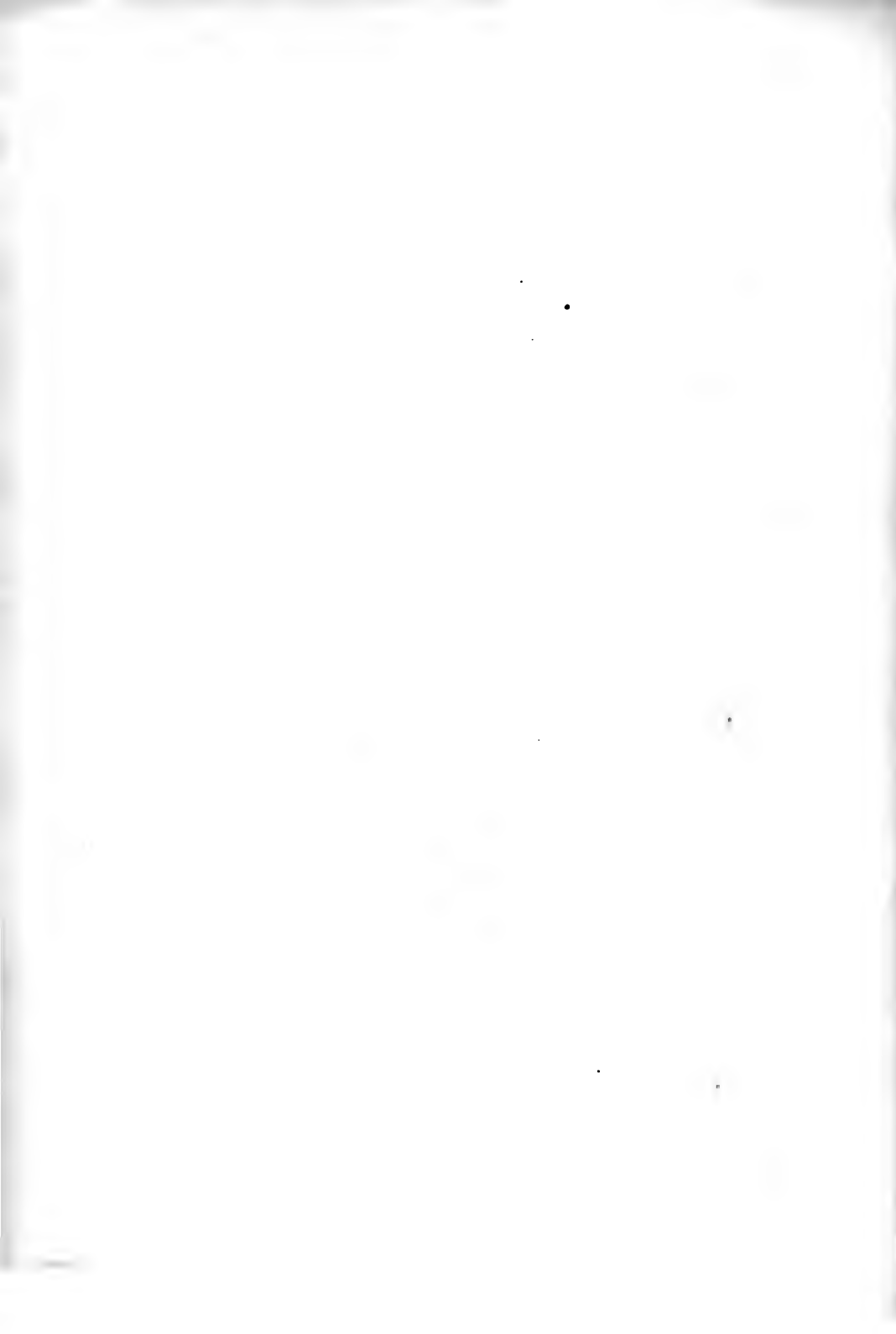
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CASES DETERMINED
IN THE
SUPREME COURT OF NEBRASKA
JANUARY TERM, 1913.

FRANKLIN STATE BANK, APPELLANT, v. WILLIAM H.
CHANNEY ET AL., APPELLEES.

FILED JUNE 16, 1913. No. 17,121.

1. **Note: CONSIDERATION: PAROL EVIDENCE.** In an action between a bank, the original payee in a promissory note, and the makers, parol testimony may be received to establish the defense of no consideration and to show that the note was given merely for the convenience of the bank and as a memorandum of a collateral transaction.
2. **Appeal: CONFLICTING EVIDENCE.** The verdict of a jury based upon conflicting evidence will not be interfered with by this court if there is sufficient competent evidence to support the same.

APPEAL from the district court for Franklin county:
HARRY S. DUNGAN, JUDGE. *Affirmed.*

W. C. Dorsey and A. H. Byrum, for appellant.

*H. W. Short, E. U. Overman and George W. Prather,
contra.*

LETTON, J.

This action was brought to recover a balance of \$532.50, with interest, upon a promissory note for \$887.75, dated January 6, 1904, signed by defendants Chaney, Gettle and Hildreth. Verdict and judgment for defendants Chaney and Gettle. Plaintiff appeals.

The defendants Chaney and Gettle answered admitting

Franklin State Bank v. Chaney.

the execution of the note. They further alleged that defendant Hildreth was the president and practically the owner of the plaintiff bank and was in full charge of its business; that defendants, together with plaintiff and one Doherty, had been interested as creditors in a certain brickyard owned by Fitz and Bruce and which was turned over to them; that Fitz and Bruce owed plaintiff \$1,000, Gettle \$500, Chaney \$200, and Doherty \$200; that plaintiff agreed to operate the brickyard for the benefit of these creditors, paying the claims *pro rata* out of the proceeds of the yard; that to evidence the interest of the bank in the property, and for its convenience solely so that it might carry its interest in the yard as an item of loans and discounts rather than as an item of personal property, and for no other consideration, the note in question was signed by these defendants with their codefendant Hildreth, who was then acting for the plaintiff bank. It is further alleged that afterwards in 1904 it was agreed between the parties that the bank should take the ownership and control of the property without regard to the claims of these defendants, and should sell and dispose of the same to pay its own claim against Fitz and Bruce without accounting to these defendants, and that the surrender of the property and the waiver of their claims should be accepted as payment of any possible liability of defendants on the note.

The reply pleads that from about August 1, 1903, until January 6, 1904, when the note in suit was given, the brickyard was operated by the three defendants, Chaney, Gettle and Hildreth; that the bank advanced various sums of money to them at various times in this period for use in the business; that before the note was executed the bank prepared and submitted to defendants a written statement showing each and every item of the running account, and all debits and credits, and that the balance due the bank on the account was \$887.75; that the defendants were afforded an opportunity to inspect and verify each item and make objections thereto, and that defendants executed and delivered the note in payment and settlement

of the stated account and are therefore estopped from setting up the defense of want of consideration. It is further alleged that no part of the indebtedness of Bruce and Fitz is included in the note sued upon. A motion was filed by plaintiff to require the defendants to elect whether they would rely on the defense that the note was a mere memorandum made for the convenience of the bank and without consideration, or upon the defense of settlement or release of liability by a subsequent agreement. This motion was overruled, and this ruling is assigned as error. It is said these defenses are plainly inconsistent, and it is argued that proof introduced to show that when the note was signed by the defendants they incurred no liability in signing it must necessarily disprove the allegation that afterwards they were released from liability by a subsequent agreement. We think these defenses are not so inconsistent that they cannot be pleaded in the same answer. Even if there were no actual liability upon the note for the reasons alleged, the fact that the plaintiff was in possession of a promissory note upon which the defendants' names appeared as makers showed that a liability apparently existed, and this apparent liability might be the moving cause for a subsequent agreement between the parties by which it was extinguished or removed. The test of inconsistency is whether the proof of one defense necessarily disproves the other. *Blodgett v. McMurtry*, 39 Neb. 210; *Nelson & Co. v. Brodhack*, 44 Mo. 596.

After both parties rested, plaintiff moved the court for an order striking from the record and instructing the jury to disregard all that part of the testimony of Chaney and Gettle to the effect that, at the time or just prior to the time the note was executed, they were assured by the plaintiff that they would never be called upon to pay the note, and that the same was and should be no liability against them, for the reason that parol testimony is inadmissible to contradict and vary the terms of a written instrument. This motion was sustained.

Plaintiff now contends that, because the court sustained

its motion to strike this testimony, there was no evidence left upon which this issue should have been submitted. It appears from the record that when the court came to submit the case to the jury, while it instructed them that they should disregard any testimony relative to statements made by the bank or its officers that the defendants were not to be liable upon the note, it further stated in the same instruction: "You may and should consider all the other evidence introduced touching the circumstances surrounding the signing and execution of the note in question, and all testimony of statements made by the parties at the time of the execution of the note which show the purpose for which the note sued on was given, and all other evidence introduced touching the consideration for the signing of said note by the defendants, if any, as defined in these instructions."

By the latter portion of this instruction the testimony as to what was said at the time the note was given with regard to the purpose for which the note was given was again submitted to the jury for its consideration. If the testimony was admissible in the first place, the defendants alone were prejudiced by it being stricken out, and that portion of this instruction which tells the jury to disregard the testimony of defendants in this respect would only be prejudicial to them, and not to plaintiff; so that the fundamental question presented is: Was this testimony proper to be considered by the jury? Plaintiff relies upon the first opinion in *First Nat. Bank v. Burney*, 90 Neb. 432; but the law laid down in this opinion was overruled upon a rehearing of that case (91 Neb. 269), and it was held that as between the parties such testimony may be received to explain the purpose for which the note was given and to show that it was a mere memorandum.

The controlling issue which was presented to the jury for its determination was whether the note was executed and delivered by the defendants to the bank in settlement of a stated account, or whether it was given in renewal of a \$1,000 note, which was originally given merely as a con-

venience for the bank and without consideration. It is not practicable in the brief space of this opinion to detail the testimony upon either contention. The testimony with respect to the relations of the parties with each other and with Fitz and Bruce, and to the brickyard property up to the time of the execution of the \$1,000 note, is not inharmonious, but as to what was said at that time, what the purpose was of that instrument, and what were the further transactions between the parties with reference to the operation of the brickyard, it is in almost irreconcilable conflict. The evidence of Mr. Hildreth, corroborated as it was by documentary evidence, would seem to be convincing that the note in suit was given in settlement of the money paid out by the bank for the defendants while they were operating the brickyard; but, as has been said, there is a decided conflict in the evidence on almost every material point, and we are unable to say that there is not sufficient evidence on behalf of the defense to support the verdict on the issue as to want of consideration. There is likewise a sharp conflict in the testimony with reference to a later settlement between the parties. Defendants testify that such was made upon a sufficient consideration, to wit, their release and cancelation of their respective claims against the brickyard, while the plaintiff testifies that no such release of the defendants from liability ever took place. There seems to be sufficient evidence on this issue also to justify its submission.

While we might have reached the conclusion that the defendants were liable if we had been the triers of fact, the settled rule is that we are not entitled to interfere with the verdict of a jury on conflicting evidence, unless it is manifestly wrong. The instructions, while not entirely consistent, submitted every question of fact in the case, and we do not feel authorized to set aside the verdict.

The judgment of the district court is

AFFIRMED.

ROSE, FAWCETT and HAMER, JJ., not sitting.

seems that this question has been foreclosed by the decisions holding that these matters must affirmatively appear in the petition. These decisions, however, apply purely to pleadings in actions founded solely on the contract. The petition before us, however, does not predicate the right to recover upon the contract alone, but asks for a recovery of the reasonable market value of property received and retained. In such a case, the later decisions of this court indicate that, even though the statutory requirements as to the making of a contract have not been carried out, if the city authorities are vested with the general authority to do the act for the performance of which the materials are supplied, and there are no elements of other than fair dealing shown, and the city elects to keep the property, there may still be a recovery for the reasonable value of the same.

By the act of 1889 (laws 1889, ch. 19, Comp. St. 1911, ch. 14, art. I, sec. 124) the city is given power to establish and maintain an electric lighting plant. The city council has power to establish the plant without submitting the question to a vote of the people. A levy of 5 mills may be made by the council every year for the purpose of establishing, extending and maintaining the plant. If this amount is insufficient, bonds may be issued for the purpose (sec. 125). The facts stated in the petition show that the city procured the poles from the plaintiff upon a promise to pay for the same; that it accepted them, used them in the construction of its plant, and still retains them, while refusing to pay either the reasonable value of the same or the contract price. While it is true that municipal corporations are governed by the provisions of their charters, and that in the absence of powers granted, either expressly or impliedly by the charter, they have no authority to contract, still, when a city is engaged in an enterprise authorized by its charter, and by virtue of its apparent authority to contract procures property which it uses in such enterprise and retains in its possession, it may become liable for the reasonable value of the same. *Rogers v. City of*

Omaha, 76 Neb. 187; *Cathers v. Moores*, 78 Neb. 13; *Rogers v. City of Omaha*, 80 Neb. 591; *Nebraska Bitulithic Co. v. City of Omaha*, 84 Neb. 375.

It is somewhat difficult to reconcile the cases in this and other courts, but the pivotal point under our former decisions seems to be whether the city had the general power to make such a contract. If it had no such power, its acts are *ultra vires* and void, and the rule of the cases cited by defendant applies with full force. If it had the power, but the manner of its exercise was irregular or defective, and the city accepts, makes no offer to return, and still retains property obtained by virtue of the irregular proceedings, it is bound, both morally and legally, to pay the reasonable value thereof, not under the void contract, but by way of compensation. 2 Dillon, *Municipal Corporations* (5th ed.) sec. 794. The principle has been fully discussed in former opinions, which are collected in *Miles v. Holt County*, 86 Neb. 238. See, also, note to *McCormick v. City of Niles*, 27 L. R. A. n. s. 1117 (81 Ohio St. 246).

We are of the opinion that the petition states a cause of action, and that the court erred in sustaining the demurrer and dismissing the case. The judgment of the district court is therefore.

REVERSED.

ROSE, J., dissents.

FAWCETT, J., not sitting.

FREDERICK B. ISKE, APPELLEE, v. MISSOURI PACIFIC RAILWAY COMPANY, APPELLANT.

FILED JUNE 16, 1913. No. 17,185.

1. **Railroads: SURFACE WATERS: DIVERSION: NEGLIGENCE.** When in the construction of a railroad it becomes necessary to cross a natural channel or waterway through which storm or surface

Iske v. Missouri P. R. Co.

waters have been accustomed to flow, it is negligence upon the part of the company to construct its embankment in such a manner as to obstruct or dam the natural waterway and thereby divert the waters which may reasonably be expected to flow therein upon the lands of others.

2. ———: ———: ———: DAMAGES. "Damages are recoverable by a landowner against a railway company for negligently maintaining an insufficient culvert or drain in an embankment, whereby his lands are flooded, although damages may have been recovered by plaintiff or his grantor for the location of the road, because the damages then recoverable were to be estimated upon the theory that the road would be constructed and maintained in a reasonably proper and skilful manner." *Chicago, R. I. & P. R. Co. v. Ely*, 77 Neb. 809.
3. WATERS: SURFACE WATERS: DIVERSION: CONTRIBUTORY NEGLIGENCE. A landowner is entitled to rely on the belief that an adjoining proprietor will refrain from wrongfully and negligently diverting flood waters upon his premises, and it is not his duty to anticipate such wrongful action by digging a ditch before floods come, or by deepening or cleaning out one already constructed.

APPEAL from the district court for Sarpy county:
ALEXANDER C. TROUP, JUDGE. *Affirmed.*

E. M. Morsman, Jr., for appellant.

W. R. Patrick, contra.

LETTON, J.

Action to recover damages to plaintiff's crops, which the petition alleges were caused by the negligent obstruction of a natural drainage channel, whereby storm and surface waters were diverted from their natural course upon plaintiff's land. The answer was a denial of negligence, a denial that defendant diverted the waters contrary to their natural flow, and a claim that the damage to the land was included in the compensation paid for the right of way. The jury returned a verdict for the plaintiff, and from a judgment on the verdict defendant appeals.

Defendant relies for a reversal upon three main points argued in its brief. The first is that in charging the jury

the court erred by omitting all reference to the question of negligence, and by permitting the jury to find against defendant if they found certain facts to exist, irrespective of whether these facts in the opinion of the jury constituted negligence. In this connection it complains specially of instruction No. 6, given by the court. It is unnecessary to set this instruction forth at length, but, in substance, it told the jury that, if before the erection of the embankment by defendant the surface waters flowed across the defendant's right of way through a well-defined channel or course, then it was the duty of the defendant in the erection of the embankment to so construct it as to leave an opening "sufficient to afford an outlet for all waters that might reasonably be expected to flow through said channel or waterway," and, "if defendant failed to do so, it would be liable in damages for such injuries as were the direct and natural result of such failure."

Defendant's position is that the evidence shows that its track was considerably lower than the ground at the mouth of the draw or drainage channel, and that, since it could not construct a culvert at that point, it should have been left to the jury to say whether or not failure to do so was negligence. We cannot take this view. We have repeatedly held that, when in the construction of a railroad it becomes necessary to cross a natural channel or waterway through which storm or surface waters have been accustomed to flow, it is negligence upon the part of the company to construct its embankment in such a manner as to obstruct or dam the natural waterway and thereby divert the waters which may reasonably be expected to flow therein upon the lands of others. Defendant's railroad may be constructed without negligence so far as the operation of trains is concerned, and yet at the same time it may be negligently constructed so far as relates to the right of adjoining proprietors upon whose lands such waters are diverted. The negligence in the latter case exists in failing to provide for the natural flow of the waters in their accustomed channel and their consequent diversion.

By other instructions the jury were told that the gist of the action was negligence in the closing of a natural channel and the diversion of the waters, and that before the plaintiff could recover it must appear that such overflow and the injury sustained thereby were directly and naturally the result of the negligent or wrongful act on the part of said defendant which is charged against it in the petition. The law relating to this subject has been so repeatedly declared that it seems almost unnecessary to cite authorities. *Fremont, E. & M. V. R. Co. v. Harlin*, 50 Neb. 698; *Chicago, R. I. & P. R. Co. v. Andreesen*, 62 Neb. 456; *Chicago, R. I. & P. R. Co. v. Shaw*, 63 Neb. 380; *Missouri P. R. Co. v. Hemingway*, 63 Neb. 610; *Roe v. Howard County*, 75 Neb. 448; *Chicago, R. I. & P. R. Co. v. Ely*, 77 Neb. 809; *Reed v. Chicago, B. & Q. R. Co.*, 86 Neb. 54.

Defendant also claims that, even under this theory of the law, appellant was not liable unless in constructing an embankment it caused the waters to flow in a direction contrary to the *natural* flow thereof—meaning the direction in which they flowed before the intervention of any act of man—and say in this connection that the construction of the line of the Chicago, Burlington & Quincy railroad diverted the waters prior to the building of defendant's road. It is shown, however, that this railroad has a sufficient culvert at the point where it crosses the ravine so that the waters flowed in their accustomed course. The evidence shows, also, that the defendant constructed an embankment and ditch on the west side of its track opposite the mouth of the ravine, extending for a distance of 40 or 60 rods, and that before this was built the water flowed in a southeasterly direction across the line of both railroads, but that afterwards all the waters coming from the ravine were directed in a northeasterly direction to the plaintiff's land. The evidence is clear, therefore, that these waters were diverted from their natural course.

It is also contended that defendant paid to the owner of the Iske farm at the time it acquired its right of way by condemnation the value of all future damages caused by a

Gleeson v. Gleeson.

non-negligent construction and maintenance of the railroad, and that this contention should have been submitted to the jury. It has been repeatedly decided by this court that for such damages as are claimed in this case the fact that condemnation money has been paid is no defense. When such proceedings are had, the damages are appraised upon the theory that the railroad company will provide the necessary outlet for waters flowing in such a ravine; and, if the company is negligent in that respect, the person damaged thereby may recover. *Missouri P. R. Co. v. Hemingway*, 63 Neb. 610; *Chicago, R. I. & P. R. Co. v. Andreesen*, 62 Neb. 456; *Chicago, B. & Q. R. Co. v. Mitchell*, 74 Neb. 563; *Chicago, R. I. & P. R. Co. v. Ely*, 77 Neb. 809; *Reed v. Chicago, B. & Q. R. Co.*, 86 Neb. 54.

It is next urged that the plaintiff was guilty of contributory negligence by reason of his failure to open or deepen a ditch upon his land which would carry off all the waters.

If the defendant by its wrongful act diverted water upon the plaintiff's premises, we know of no principle of law which made it his duty to anticipate such wrongful action by digging a ditch before floods came, or by deepening or cleaning out one already constructed. A landowner is entitled to rely on the belief that an adjoining proprietor will refrain from wrongfully and negligently diverting flood waters upon his premises.

We find no error in the record, and the judgment of the district court is

AFFIRMED.

BARNES, SEDGWICK and HAMER, JJ., not sitting.

KATE L. GLEESON, APPELLANT, v. WILLIAM J. GLEESON,
APPELLEE.

FILED JUNE 16, 1913. No. 17,194.

Divorce: ADJUSTMENT OF PROPERTY RIGHTS. The decree in this case which finds the defendant entitled to a share of the property accumulated by the joint efforts of husband and wife during the existence of the marriage relation is sustained by the evidence.

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Affirmed.*

C. S. Polk, for appellant.

Price & Abbott, contra.

LETTON, J.

This is an action for divorce on the ground of non-support and extreme cruelty. The defendant denied that he was guilty of the commission of the acts charged and of failure to support his wife, and by way of cross-petition alleged that during marriage a large amount of real and personal property had been accumulated by their joint efforts, which was held in the plaintiff's name, and that he was entitled to one-half of the same. He asked that if a divorce be granted he be declared the owner of one-half of the property. The court found that the plaintiff was entitled to a divorce, and also found that certain real estate in plaintiff's name was accumulated by the joint efforts of the parties during marriage. It adjudged that plaintiff should pay the defendant \$1,000 for his equity therein and the title quieted in her when that was done. Plaintiff appeals.

It is unnecessary to detail the evidence. In 1898, at the time the parties were married, the plaintiff had been keeping a rooming house in Lincoln for some years; she continued to do so until a short time ago, when the business and furniture was sold and the proceeds, together with \$2,200 which she inherited, were invested in other real estate, which is the property described in the defendant's answer. According to plaintiff's account of the joint affairs, the husband was a worthless loafer, a drunkard, and addicted to the use of opium. He would leave home without cause and be gone for periods of three to ten months, and while he was at home she performed most of the work in the rooming house without much assistance from him. She also testifies he took money from her a number of times

when he went away, usually in sums of about \$100. Her testimony as to the failure of defendant to work does not seem to be corroborated to any extent. On the other hand, the defendant admits that he occasionally became intoxicated, and confesses that he left home on a few occasions, as testified to by the wife, but he introduces a material variation in the plaintiff's story by declaring that he was practically driven away by her. He testifies positively that while at home he did nearly all the work connected with the care of the rooming house, making beds, sweeping, scrubbing, varnishing woodwork and furniture, etc., and that when the new property was acquired he painted the rooms, worked in the yard, took care of those rooms that were rented, as in the other house, and did other work about the premises. His testimony as to his work in the rooming house is corroborated by several other witnesses.

It is impossible for this court to tell from the cold record which of these witnesses is telling the truth. Where a person is accused of being a drunkard and confirmed opium user, his personal appearance upon the witness-stand may often throw light upon the truth or falsity of the charge. The trial court had both parties before it, and is better qualified to determine the truth of their respective stories than this court. It evidently believed the defendant, in part at least, as to his share in the joint accumulation.

The new house was purchased for \$7,400; there is a mortgage upon it for \$1,600, leaving the equity of the plaintiff therein \$5,800. Twenty-two hundred dollars of this was derived from her inheritance, so that \$3,600 from the proceeds of the business had been invested in this property. There is also \$500 from the profits of the rooming house invested in a farm in Wyoming. At the time the parties were married the wife's property was worth from \$50 to \$100, leaving about \$4,000 net as their joint accumulations. We think the division of the property made by the district court is fair. No objections were made in the district court to the settlement of these prop-

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erty rights, and hence none will be considered here. *Greene v. Greene*, 49 Neb. 546.

We find no error in the judgment of the district court, and it is therefore

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

JAMES W. MEDLIN, APPELLEE, v. WILLIAM L. HUFFMAN,
APPELLANT.

FILED JUNE 16, 1913. No. 17,255.

Appeal: INSTRUCTIONS: HARMLESS ERROR. Where a statement of law contained in a portion of an instruction complained of as error relates to facts which the jury found did not exist, the alleged error is immaterial and will not be considered.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Affirmed.*

Charles W. Haller, for appellant.

Clement L. Waldron, contra.

LETTON, J.

Action to recover for damages and for money expended in repairs to a motor buggy left with the appellant for sale. The answer is a general denial. Plaintiff recovered, and defendant appeals.

Plaintiff bought the vehicle in June, 1908, paying \$475 for it. After being used more or less, he brought it to defendant, who is a dealer in automobiles, about February, 1909, and left it with him at his place of business. There is a direct conflict in the testimony as to what arrangement was made when this was done; the plaintiff testifying that the agreement was that it was left with defendant for sale, defendant then claiming to have a customer, and that it was further agreed \$200 of the purchase price should be

paid to plaintiff, and all money received above that amount should be retained by defendant for his services in selling the buggy. Plaintiff's wife corroborates this testimony, while defendant denied that any such conversation was had. His testimony is to the effect that he told plaintiff that he might leave the machine at his place of business, and that it would not cost him anything. Five witnesses testify that the buggy was in fair or good running order when it was left with the defendant, and an equal number testify to the contrary. A letter was introduced in evidence from the plaintiff to the manufacturers of the machine, introducing Mr. Huffman, complaining that the machine had never worked well, suggesting that they make the defective parts good, and concluding that Mr. Huffman "will explain the matter fully to you." Medlin testified that he wrote this letter at Huffman's request and under his direction. A number of witnesses testify to the value of the machine at the time Huffman received it, fixing the value from \$250 to \$300, while Mr. Huffman testified it was worth from \$35 to \$100. Other witnesses testify it was worth only \$35 to \$40 when received by Huffman. Mr. Huffman also denies knowing the contents of this letter until he received it in Chicago.

The trial court instructed the jury: "Should the proofs show the buggy was left for sale on commission, then the defendant owed an ordinary and reasonable degree of care during such custody. Should the proofs show a simple storage without charge therefor, then the defendant owed simply the duty of keeping with slight care and not wantonly injure. You are instructed that by the term 'slight care' is meant such degree of care as one ordinarily takes of his own property."

The appellant claims that the court erred in defining slight care in this instruction. Since the jury found that the buggy was left for sale on commission, this portion of the instruction, whether right or wrong, had no effect upon the verdict and could not be prejudicial error if erroneous.

The only other complaint made is that the court erred in

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permitting one witness to testify as to the value of the vehicle without being properly qualified as to his knowledge of values. Since a number of other witnesses fix the value much higher than did this witness, and since the verdict was for much less than the value fixed by him, we do not think this affected defendant's substantial rights or constitutes reversible error.

The judgment of the district court is

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

**CHARLES S. EASTON ET AL., APPELLEES, V. SNYDER-TRIMBLE
COMPANY, APPELLANT.**

FILED JUNE 16, 1913. No. 17,270.

1. **Witnesses: CROSS-EXAMINATION.** "The cross-examination of a witness should be restricted to the facts and circumstances drawn out on his direct examination. If it is desired to examine the witness upon other matters, the party desiring such examination must make the witness his own, and call him as such." *Davis v. Neigh*, 7 Neb. 84.
2. **Contracts: PAROL MODIFICATION: CONSIDERATION.** "While executory and before a breach, the terms of a written contract may be changed by a subsequent parol agreement; and such subsequent agreement requires no new consideration." *Bowman v. Wright*, 65 Neb. 661.

APPEAL from the district court for Douglas county:
WILLIAM A. REDICK, JUDGE. *Affirmed.*

De Bord, Fradenburg & Van Orsdel, for appellant.

C. J. Garlow and Walter S. Stillman, contra.

LETTON, J.

Plaintiffs seek to recover from defendant upon an alleged oral contract the price of 525 barrels of apples at \$2.50 a barrel, which it is alleged were sold and delivered

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to them under the contract. Defendant's answer denied the existence of an oral contract, but admitted the purchase of 1,600 barrels of apples by a written contract under which 524 barrels had been delivered and accepted. It also, by way of counterclaim, alleged that defendant had purchased 1,600 barrels of apples; that the apples delivered were of the value of \$1,310; that, on account of the failure of plaintiffs to deliver the apples purchased according to contract, the defendant lost the difference between the contract price and the market value of the apples. It also alleged that the plaintiffs were indebted for the expenses and wages of the men furnished by it at the plaintiffs' request in the sum of \$88.90. It prays judgment for the difference between the amount due the plaintiffs and its loss of profits, and expenses amounting to \$582.65. By reply the plaintiffs admitted the execution of the written contract, but alleged that it was afterwards orally waived by the parties. Plaintiffs had judgment, and defendant appeals.

The defendant is a wholesale fruit merchant in Omaha. The plaintiffs were engaged in 1909 in buying apples from the owners of orchards, picking and sorting the same, and selling them to dealers. On September 18, 1909, plaintiffs, by Mr. Easton, entered into a written contract with the defendant to sell it 1,600 barrels of apples, "800 barrels hand-picked Jonathans, 800 barrels Ben Davis, Winesaps and Genetons, to be barreled and loaded on board cars at Bellwood to be shipped to Omaha, bill of lading attached." On October 4, 1909, plaintiffs shipped a car-load of Jonathan apples under this contract. Easton sent the bill of lading to defendant by mail, and in the letter inclosing the same intimated plaintiffs would be unable to furnish the full amount of Jonathans, saying also that he "would be able to fill the whole contract with other varieties * * * and I may be able to send you in another car of Jonathans." Some doubt was also expressed as to the car shipped coming up to the standard, and he requested to be notified if they were not accepted. The car was received in Omaha,

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October 9, 1909, but the apples were rejected by the defendant as not coming up to contract grade. Easton and Trimble had a conversation over the telephone with regard to this car, and at Easton's request Trimble released it and it was billed out by Easton to Illinois. Easton testifies that in this conversation he told Trimble that he had better come to Bellwood and see further about the shipment of apples before any more were shipped; that Trimble went to Bellwood the next day, October 9, and went with him through the orchard where the apples were being picked; that that evening Easton accompanied Trimble to Columbus on the train, and that while on the way Easton objected to shipping any more apples; that Trimble agreed that plaintiffs need not ship any more, but said, "I would like to have the apples in this orchard. * * * I am buying apples 25 cents per bushel cheaper in Omaha today than I am paying you for these, but these being an extra quality of apples why I will let the price remain and take the apples from this orchard here;" that it was further agreed that Trimble was to furnish a man at \$3 a day to oversee the packing of the apples, and that the apples were to be paid for as shipped. He testifies further that on Monday, October 11, he went to Illinois, and returned on the evening of October 17, when he found that Trimble and two of his employees were at Bellwood packing and shipping apples.

On the other hand, Trimble, while admitting he had a conversation with Easton on the train, says it was after the apples were shipped, and positively denies any modification, waiver or abandonment of the contract in this conversation. He says that Easton then said something about thinking he would not be able to fill the contract, but that he told him "the contract was for so many apples, and that if he didn't have them he could buy them and furnish them to the Snyder-Trimble Company."

There is a good deal of inconsistency in the testimony as to the dates of the visits of Trimble and Easton to the orchard, and as to the time of the conversations on the train, whether before or after the apples were picked, but

these matters are not essential to the consideration of the points presented for review.

The plaintiffs' right to recover in this case depends upon whether the provisions of the written contract, while still executory, were superseded and set aside by mutual agreement and an oral contract entered into for the sale of apples in a specific orchard. If the written contract was not thus set aside, then the rights and liabilities of the parties must be measured by its terms.

The defendant complains that the court erred in refusing to allow it to show on cross-examination of Easton that Mr. Garlow was authorized to conduct a correspondence on behalf of Easton & Bennett with Snyder & Trimble and their attorneys, and in excluding this correspondence and testimony explanatory thereof. After Easton had testified to having received a letter from defendant dated October 28, 1909, stating defendant was deferring payment on the apples shipped until they heard from Easton & Bennett regarding the delivery of the remainder bought under the contract, a question on cross-examination as to his knowledge that his counsel, Mr. Garlow, was carrying on a correspondence with defendant with regard to the apples was excluded on the objection that it was improper cross-examination and its purpose was to compel the divulgence of a privileged communication between attorney and client. This was not proper cross-examination, having no relation to facts brought out in chief. An offer to prove Garlow's authority was also excluded. Mr. Garlow was called as a witness by the defendant. A letter was shown to him which was written by him to the Snyder-Trimble Company on November 1, 1909. The witness testified that he was the attorney for plaintiffs in relation to the controversy with Snyder-Trimble Company, that he had seen a copy of the written contract, dated September 18, 1909, at the time he wrote the letter. The letter is as follows: "Nov. 1, 1909. Messrs. Snyder-Trimble Co., Omaha, Nebraska. Dear Sirs: Messrs. Easton & Bennett of Cambridge, Nebraska, have placed in my hands a claim against

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you for adjustment of 525 barrels of apples at \$2.50, making \$1,312.50. I also have copy of contract and statement of the facts regarding the deal. I am advised that you are long in default in payment so please remit to me at once, and oblige. Yours truly, C. J. Garlow." Garlow was then asked whether, in writing this letter of November 1, he therein referred to the written contract of September 18. The plaintiffs objected to this, and the objection was sustained. This letter was offered in evidence, but it was also objected "that it divulges a confidential relation existing between client and counsel, * * * for the further reason that any communications had between counsel regarding any matter in dispute cannot be binding upon the clients, and is improper and incompetent." The objection was sustained. The witness was then asked whether he received an answer from Snyder-Trimble Company, or any one representing them, to the letter of November 1. The witness was then shown a series of letters from him to Baldrige, De Bord & Fradenburg, defendant's attorneys, and letters from them in reply in relation to the controversy, and he was then asked to identify the same; but, upon objections, he was not required to answer, and the letters were excluded. If the letters had been written by the plaintiffs themselves, they were probably admissible as tending to show an attitude somewhat inconsistent with the hypothesis of the apples having been sold under an oral contract for the contents of one orchard, but the question of admissibility of the letters depends upon their materiality and upon how far the statement or declarations of an agent for the collection of money with respect to the past transaction out of which the liability is claimed to have arisen are binding upon his principals.

In *Saunders v. McCarthy*, 8 Allen (Mass.) 42, the attorney for the plaintiff made certain statements as to the facts in the case against his client's interest. This evidence was held properly excluded, the court saying: "The admissions in this case were mere matters of conversation, and, though they related to the facts in controversy, they

cannot be received in evidence against the plaintiff. The attorney was not the agent of his client to make such admissions. 1 Greenleaf, Evidence (16th ed.), sec. 186. If they had been in writing they would not have been admissible." This is the general rule. *Underwood v. Hart*, 23 Vt. 120, 129; Jones, Evidence (2d ed.) sec. 255; *People v. Vernon*, 35 Cal. 49, 95 Am. Dec. 49.

The contents of the first letter are not so inconsistent with the claim of plaintiffs as to make it material to the controversy. The statement, "I also have copy of contract," is qualified by the further statement, "and statements of the facts regarding the deal." If the written contract alone was the basis of the claim, there was no necessity for any "statements of the facts regarding the deal." The language used is consistent with the idea that the written contract originated and the oral contract terminated the transaction between the parties. It might have been as well to have allowed the letter to go to the jury, but we cannot say its exclusion was prejudicially erroneous. The other letters excluded were between the attorneys for the respective parties, and were in part negotiations for a settlement. We think they were also properly excluded.

It is next argued that, there being no consideration for the abrogation of the written contract, it is still in full force and effect. In *Bowman v. Wright*, 65 Neb. 661, we held: "While executory and before a breach, the terms of a written contract may be changed by a subsequent parol agreement; and such subsequent agreement requires no new consideration." We adhere to this view.

While it is not improbable that the jury reached the wrong conclusion on the facts, there is enough evidence to uphold the verdict, and the judgment of the district court must be, and is, affirmed. Other points are presented, but we find no error which we consider affected the substantial rights of the defendant.

The judgment of the district court is

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

STANSBERRY LUMBER COMPANY, APPELLANT, v. SCHOOL
DISTRICT OF CITY OF MCCOOK ET AL., APPELLEES.

FILED JUNE 16, 1913. No. 17,281.

Assignments: PRIORITY. Where a portion of a fund in the hands of a school district due to a building contractor was assigned by the contractor to one who had furnished material for the building, and the school board was immediately notified of the assignment, the facts that the signed order was not left with the school board, but an unsigned copy thereof, until several months afterward, when, the original assignment being lost, a new assignment was executed and filed, and that in the meantime another assignment of the same fund was made to another creditor and filed with the board, did not affect the rights of the first assignee.

APPEAL from the district court for Red Willow county:
ROBERT C. ORR, JUDGE. *Affirmed.*

Cordeal & McCarl, for appellant.

Lambe & Butler, contra.

LETTON, J.

One Liberty, a building contractor, built a schoolhouse for the city of McCook under contract. Among those who furnished material for the building were the assignors of the plaintiff and defendant McCook Brick Company. At the time this action was begun there was \$1,013.70 in the school district treasury to the credit of Liberty. The plaintiff claimed this amount by reason of an assignment dated October 23, 1907, made by Liberty, and of which notice was given to the school district next day. The defendant claimed \$779 out of the fund by virtue of an assignment from Liberty alleged to have been made on July 30, 1907, and of which notice was immediately given to the school district. The right of the plaintiff to the fund is clear, unless there had been a prior assignment of the same to defendant. From a decree holding that defendant had the prior right to the fund, plaintiff appeals.

The facts are a little peculiar. Mr. McAdams, the secretary of the McCook Brick Company, testified that on July 30, 1907, he procured from his attorney an original and one copy of a form of assignment; that Liberty signed and delivered to him the original order; that there was to be a meeting of the school board that evening or next morning, which Liberty was to attend, but at which McAdams could not be present; that after the order was signed he handed it back to Liberty, and asked him to give it to the board; that a few days after the meeting he spoke to Mr. Barnes, secretary of the school board, who told him the order had been handed to him by Mr. Barnett, a member of the school board, and had been presented, but no action taken on it, and that later Barnett gave him the same information. The record of the proceedings of the school board was introduced, which shows, under date of July 30, 1907: "Order of McCook Brick Company brought up and discussed, but laid over till a future meeting of a full board." About two months afterwards Barnes told him that the order was missing, and he procured a new one on November 20, 1907, which he filed with the board. About a week before the trial Barnes told him for the first time that the first order was in blank, and was not signed by Liberty. After proving a search, the witness testified to the contents of the first order or assignment, which was in the usual form. Mr. Barnes testified that he was handed a typewritten order, such as Mr. McAdams describes, by Mr. Barnett at the meeting July 30, 1907, but that the order was in blank, never having been signed; that a long time afterward he gave this blank to Mr. Wolfe. He also says that Liberty was present at the meeting on July 30, and he is unable to say that Liberty did not mention the fact that he had given the order. He also admits that it was only a few days before he received the order of November 20 that he told Mr. McAdams that the school board had no signed order in its possession. Mr. Barnett contradicts both Barnes and McAdams, and denies ever seeing or handling a paper of this kind. The evidence of Liberty

is not in the record, the trial court refusing to allow an adjournment to procure his testimony, due diligence not having been shown.

Plaintiff's first contention is that, since McAdams by returning the order to Liberty made him the agent of the brick company to deliver the same to the school board, if Liberty destroyed the order and did not present it, there was then no order in existence, and the brick company acquired no rights superior to those of a subsequent assignee. When Liberty signed and delivered the order to Mr. McAdams, he thereby conveyed all his interest in the fund to the brick company. It could not lose the right thereby acquired, unless by some subsequent act of omission or commission on its part. Even though the order itself were destroyed by Liberty and only a carbon copy of the same delivered to the school board without signature, the fact that the board had notice and knowledge of the existence of the assignment before it changed its position by paying out any money upon the order, and before being notified of the existence of another and subsequent assignment, rendered its liability complete, and the assignee might, under section 30 of the code, have maintained an action against it in its own name to recover the fund.

Plaintiff also contends there is no evidence that the assignment executed in July was brought to the notice of the school board. Mr. Barnes testifies that the entry in the record of its proceedings referred to the blank order which had been handed to him by Barnett; but the evidence is positive that, not only Barnes, but other members of the school board, knew that McAdams claimed to have an order signed by Liberty for this fund. Whether the paper which was left with the board was the signed order or merely a copy of it is not so very material when it is considered that there is nothing to contradict the testimony that the order was actually signed, and that the board had knowledge of the claimed assignment and retained the fund in its possession.

Richardson v. Frontier County.

Under the facts in the case, we find it unnecessary to discuss the legal question as to whether a subsequent assignee, by giving the first notice of assignment to the holder of the fund, can thereby gain priority over a prior assignee. The evidence is sufficient to sustain the district court in holding that the brick company had the first assignment and the plaintiff the second in point of time.

The judgment of the district court is

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

OLIVER RICHARDSON, APPELLANT, V. FRONTIER COUNTY ET AL., APPELLEES.

FILED JUNE 16, 1913. No. 17,308.

1. **Highways: ESTABLISHMENT: NOTICE: APPEARANCE.** One who appears at the hearing on the petition for the establishment of a public road and takes part in the proceedings cannot after complain that he did not receive notice in the legal manner.
2. ———: **LOCATION: VARIATIONS.** It is not essential that a public road be laid out upon the exact line prayed for in the petition, and slight variations in order to procure a more practicable route are permissible.

APPEAL from the district court for Frontier county:
ROBERT C. ORR, JUDGE. *Affirmed.*

L. H. Cheney and Lambe & Butler, for appellant.

W. S. Morlan, H. W. Berry, W. H. Latham, J. A. Williams and J. L. White, contra.

LETTON, J.

This action was brought to restrain the defendants from opening a public road across the land of plaintiff, from trespassing upon it, and from tearing down his fences. The district court found for defendants, and dismissed the plaintiff's action.

The pleadings are exceedingly voluminous, but plaintiff's complaint seems to be that the notice of the proposed establishment of the road petitioned for was insufficient; that there was a departure from the route petitioned for in the report of the commissioner, and a still further departure by the surveyor; that no provision was made to ascertain and compensate the plaintiff's damages; that he was deceived into appearing at the hearing upon the petition by the defendants; that the county officers accepted another road dedicated by the plaintiff in lieu of the road petitioned for, and are now estopped from opening a second road across his premises; that at the point where the overseer is threatening to tear down the fences there is no public highway, and that there is no money in the road funds wherewith to pay his damages.

The defendants plead the legality of all the proceedings. It is further alleged that the plaintiff consented to the changes and departures from the line described in the petition; that due notice for the filing of claims for damages was given; that plaintiff with knowledge of all the facts presented a claim for damages, and was allowed \$200; that he afterwards appealed from this allowance, and dismissed the appeal; that he assisted in establishing the route of said road, and is now estopped from claiming any irregularities.

It is unnecessary to consider whether the plaintiff had legal notice of the proceedings for the establishment of the road. He appeared at the time and place set for the hearing, was represented by an attorney, and took an active part in the proceedings. The claim that he was induced to do so by the artifice of the county officers is not based upon the evidence. The original petition was signed by a large number of landowners nearby who were desirous for the location of the road. A commissioner to view the route was duly appointed. On June 21, 1909, he reported in favor of the establishment of the road, varying slightly from the line prayed for in the petition, but substantially in the same general course and with the same starting point

and termination. He also filed a plat in conformity with this report. The road was established in accordance therewith, and the notice to remove fences given by the road overseer to the plaintiff describes the road as thus located. The mere fact that the line of road was not in exact accordance with the line prayed for is immaterial. It was the duty of the viewer to lay out the most practicable route within reasonable limits, and apparently this was done.

On September 6, 1909, the date fixed for the hearing upon the petition, the plaintiff filed a proposition to grant the right of way for a road across his land at another point, in consideration of \$187 damages. After considering the proposition of the plaintiff, the claims for damages and the evidence, the board found in favor of the establishment of the road as prayed for in the petition and recommended by the viewer. The appraisers appointed to ascertain and fix the amount of damages reported in favor of allowing the plaintiff \$187. The county commissioners, however, allowed the plaintiff \$200 as damages. While it is shown the matter of crossing plaintiff's land by another course was considered, there is no proof that the county authorities accepted another road dedicated by the plaintiff in lieu of the road petitioned for.

It is also complained that since the road was established the county surveyor has staked it out upon a different line from the proper one, and that the road overseer is threatening to tear down plaintiff's fences on the line laid out by the surveyor. If the road overseer should attempt to tear down the plaintiff's fences at a point where the road is not established he would be entitled to his proper remedy, but we find no proof of such facts.

The contention that no provision has been made for money to pay plaintiff's claim for damages is unsupported by the evidence. The county treasurer testifies he has the money in his hands for that purpose, and has been ordered by the county board to retain it for the payment of the warrants issued for plaintiff's benefit. It is immaterial whether the money was on hand when the road was located,

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though it is very material whether it is on hand or provided for before the road is opened.

We can see no merit in the plaintiff's appeal, and the judgment of the district court is

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

H. C. BUSBOOM, APPELLEE, v. CONRAD SCHMIDT ET AL.,
APPELLANTS.

FILED JUNE 16, 1913. No. 16,914.

1. Pleading: DEMURRER: ADMISSIONS. A demurrer to a pleading admits only such facts as are well pleaded, mere conclusions of the pleader not being admitted.
2. Appeal: REVIEW. The objection that an unverified pleading, which has been superseded by an amended pleading, is inadmissible in evidence against the pleader, to be available on review, should be made in the trial court.
3. ———: INSTRUCTIONS: HARMLESS ERROR. In a suit on a note, an instruction withdrawing from the jury the defense of want of consideration held not erroneous, where defendants by their own testimony proved a valid consideration.

APPEAL from the district court for Seward county:
GEORGE F. CORCORAN, JUDGE. *Affirmed.*

Landis & Schick and E. J. Clements, for appellants.

Norval Bros., contra.

ROSE, J.

This is an action on a promissory note for \$900, dated May 1, 1905, and payable May 1, 1906. The payee, H. C. Busboom, is plaintiff, and the makers, Conrad Schmidt and Fred Schmidt, are defendants. The answer of Fred Schmidt was a general denial. Conrad Schmidt pleaded (1) want of consideration; (2) accord and satisfaction; and (3) lobbying as the consideration. From a judgment

in favor of plaintiff for the full amount of the note and interest, defendants have appealed.

1. To the third defense mentioned the trial court sustained a demurrer, and the correctness of this ruling is the first question presented. Was a lobbying contract properly pleaded as the consideration for the note? That part of the answer challenged by the demurrer contains the averment that the payee agreed to "lobby" for a license for the makers of the note, and the agreement to do so is characterized as a "lobbying contract," but facts showing that the use or employment of unlawful means on the part of plaintiff was contemplated by the parties are not properly alleged. A demurrer to a pleading admits such facts only as are well pleaded. "Lobby" and "lobbying," without stating the facts constituting such acts, are mere conclusions of the pleader not admitted by the demurrer. It is clear, therefore, that lobbying as an illegal consideration was not well pleaded, when the third defense is searched by demurrer.

2. Complaint is made because the trial court received in evidence part of an original pleading or answer admitting the execution of the note, though that fact was denied in an amended answer. The objection now is that the superseded answer was not signed or verified by the answering defendant, and that there is nothing to show he had any knowledge of its contents. The record does not contain an objection in the trial court on this ground. The execution of the note was proved by other testimony. The assignment of error is therefore overruled.

3. It is argued that the court erred in instructing the jury to return a verdict for plaintiff, if the defense of accord and satisfaction had not been shown by a preponderance of the evidence; the effect being to withdraw the defense of want of consideration. Defendants have no reason to complain of this instruction. By their own testimony they proved a valid consideration.

There is no error in the record.

AFFIRMED.

REESE, C. J., LETTON and FAWCETT, JJ., not sitting.

WILLIAM S. FITCH, APPELLANT, v. PATRICK WALSH,
APPELLEE.

FILED JUNE 16, 1913. No. 17,186.

1. **Pleading: GENERAL DENIAL: EJECTMENT: ESTOPPEL.** Under a general denial in ejectment, defendant is permitted, by section 627 of the code, to prove an estoppel for the purpose of defeating plaintiff's cause of action.
2. **Boundaries: ESTOPPEL.** A lessee of school land, who points out to a purchaser a boundary line along one side of the demised premises and transfers the lease to him, may be estopped to dispute the line thus designated, where the purchaser, relying upon it in good faith, built a fence thereon, maintained it for 17 years, cleared and occupied the land on his side of the fence, and afterward purchased the fee

APPEAL from the district court for Red Willow county:
ROBERT C. ORR, JUDGE. *Affirmed.*

B. F. Butler and C. E. Eldred, for appellant.

W. S. Morlan and J. L. Rice, contra.

ROSE, J.

The action is ejectment. The parties are owners of adjoining farms in Red Willow county. A part of the boundary line between their possessions is in dispute. Plaintiff claims a short, narrow strip of land occupied by defendant, alleges he has a legal estate therein, and that he is entitled to possession thereof. The answer is a general denial. From a judgment in favor of defendant, plaintiff has appealed.

1. In the admission of evidence and in the instructions to the jury, the trial court recognized the right of defendant, under his general denial, to prove facts showing that plaintiff was estopped to question the line which marked the controverted boundary of the disputed strip occupied by defendant. In these respects the rulings are challenged as erroneous, because estoppel was not specially pleaded.

Fitch v. Walsh.

Was it proper to prove an estoppel under a general denial? There is specific legislation on the subject of pleading in ejectment. The code declares: "In an action for the recovery of real property, it shall be sufficient, if the plaintiff state in his petition that he has a legal estate therein, and is entitled to the possession thereof." Code, sec. 626. "It shall be sufficient in such action, if the defendant in his answer deny, generally, the title alleged in the petition." Code, sec. 627.

A text-writer on Ejectment says: "Where special pleading is not allowed, the defendant, in support of his possession, may give in evidence any matter which would have operated as a bar if pleaded by him by way of estoppel to a real action brought for the recovery of the same premises." Tyler, Ejectment and Adverse Enjoyment, p. 465.

In *Franklin v. Kelley*, 2 Neb. 79, 118, this court said: "It is undoubtedly true that the theory of the system of pleading under the code generally is that the facts necessary to constitute a cause of action or defense shall be stated. But, in respect of actions for the recovery of real property, another rule has been adopted. Why this is so is not very clear. It may be because, as two trials, of course, are given in that class of actions, the parties are supposed to learn, from what is shown on the first, what will be in issue on the final trial. But, whatever the reason, it is apparent that in this class of actions, as also in cases of replevin, the facts need not be stated. That being the rule of pleading contained in the code, we have only to enforce it here." This language was approved in *Staley v. Housel*, 35 Neb. 160, wherein it is held that defendant, under a general denial, may prove any fact which will defeat the plaintiff's cause of action, and that the rule established by the code is not changed by language of a different import in *Uppfalt v. Nelson*, 18 Neb. 533, a case herein cited by plaintiff. Under the general denial pleaded by defendant, therefore, proof showing that plaintiff's assertion of title was defeated by estoppel was properly admitted in evidence and considered by the jury.

2. Was the defense of estoppel proved? The record contains evidence tending to show the following facts, most of which are undisputed: The land in controversy was formerly school land. Under a lease from the state plaintiff formerly had an interest in the tract owned and occupied by defendant. At the same time defendant had a similar interest in the land now owned and occupied by plaintiff. The interests thus acquired by lease from the state were exchanged by plaintiff and defendant in 1893, each taking possession of the tract which had been leased by the other. When they were negotiating for the exchange, they went upon the premises for the purpose of determining the boundary line between the leased tracts. Plaintiff pointed it out, and soon thereafter defendant built a fence on it. During the following spring defendant employed men, and with them cut the timber and grubbed the brush on his side clear up to the fence. Relying on the line thus established, he bought from the state the land held by him under the exchanged lease, paid for the same, and procured a deed therefor. He kept up the fence in the same place, and has used the land on his side of it without interruption ever since, a period of 17 years. In the meantime plaintiff occupied the land on the other side of the fence under a lease or deed. Until the beginning of this suit plaintiff did not dispute the boundary pointed out by him and relied upon by defendant. These facts, if established, constitute an estoppel binding on plaintiff. *Clark v. Thornburg*, 66 Neb. 717; *Merricether v. Larmon*, 3 Sneed (Tenn.) 447; *Spears v. Walker*, 1 Head (Tenn.) 166; *Ward v. Middleton*, 124 S. W. (Ky.) 823; *Allyn v. Schultz*, 5 Ariz. 152; *Seberg v. Iowa Trust & Savings Bank*, 141 Ia. 99; *Rowell v. Weinmann*, 119 Ia. 256; *Parrish v. Williams*, 79 S. W. (Tex.) 1097; *Clark v. Hindman*, 46 Or. 67; *Thompson v. Borg*, 90 Minn. 209. Plaintiff admitted that the exchange of leases was made in the fall of 1893, that defendant built his fence the next spring and kept it in the same place thereafter, and that defendant has claimed and occupied the land on his side of the fence ever since. The issue of estoppel and

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the evidence thereon were properly considered by the jury with other questions of fact, including adverse possession. There was a general verdict in favor of defendant. Upon a consideration of the whole case, it seems clear that no other conclusion could have been reached, in view of the rules of law stated and the evidence applicable to the question of estoppel.

The judgment will therefore be affirmed without a discussion of other assignments of error.

AFFIRMED.

BARNES, SEDGWICK and HAMER, JJ., not sitting.

MARK J. RYAN, APPELLEE, v. CONTINENTAL CASUALTY
COMPANY, APPELLANT.

FILED JUNE 16, 1913. No. 17,199.

1. **Appeal: FINDINGS: REVIEW.** On appeal, a special finding of fact by a jury will not be disturbed unless clearly wrong.
2. **Insurance: CONSTRUCTION OF POLICY: RECOVERY.** In a suit on a \$500 accident insurance policy providing that, if the injury causing the loss results wholly or in part from the intentional act of insured or of any other person, the insurer's liability shall be one-fifth of the amount otherwise payable, plaintiff's recovery is limited to \$100, where the uncontradicted evidence shows that assured was intentionally struck in the face by another person, who did not intend to kill him, and that assured fell backward, striking his head on the pavement and fatally fracturing his skull; the injury to his face by the initial blow not being serious

APPEAL from the district court for Hall county. JAMES N. PAUL, JUDGE. *Reversed with directions.*

M. P. Cornelius, Harrison & Prince and Manton Maverick, for appellant.

Arthur G. Abbott and O. A. Abbott, contra.

ROSE, J.

This is an action to recover \$500 on an accident insurance policy dated January 29, 1909. Thomas P. Ryan, assured, died December 25, 1909. His brother, Mark J. Ryan, plaintiff, had been named in the policy as the beneficiary. Defendant offered to confess judgment for \$100, and pleaded two defenses to the remainder of plaintiff's claim: (1) Assured was intoxicated when the injury resulting in his death was inflicted, and for that reason defendant is not liable for more than \$100 under the terms of the insurance contract. (2) The injury causing the death of assured resulted wholly or in part from the intentional act of another person, a risk limited by the policy to one-fifth of the insurance otherwise payable. From judgment on the verdict of a jury in favor of plaintiff for \$500, defendant has appealed.

1. The evidence of assured's intoxication at the time of the injury is very meager. This conclusion is reached after an examination of the evidence without reference to the abstracts. The jury made a special finding that assured was not intoxicated when injured, and on that issue there is ample evidence to sustain their verdict.

2. The question presented by the other defense is harder to answer. Under "Part V" of the policy, relating to "Special Accident Indemnities," the following provisions are found: "In any of the losses covered by this policy (1) where the injury causing the loss results wholly or in part from voluntary exposure to unnecessary danger or obvious risk of injury, or from the intentional act of the insured or of any other person (assaults committed upon the insured for the sole purpose of burglary or robbery excepted); * * * then in all cases referred to in this paragraph B of Part V the amount payable shall be one-fifth of the amount which otherwise would be payable under this policy, anything in this policy to the contrary notwithstanding, and subject otherwise to all the conditions in this policy contained."

Defendant argues that within the meaning of the policy "the injury causing the loss" resulted "wholly or in part" from "the intentional act" of a person other than insured, that this fact is shown by uncontradicted evidence, and that consequently one-fifth of the amount otherwise payable, or \$100, is the limit of recovery. During the evening of December 24, 1909, assured was engaged in performing the duties of his employment as a helper on the stage in the opera house at Wood River. After the performance, as late as 1 or 2 o'clock the next morning, he was in that city on the sidewalk in front of a public telephone office with one of the showmen and Charles Thompson. Witnesses who were in the telephone office at the time heard some of the remarks and saw what occurred. Thompson exclaimed, "I can lick you," and struck from his shoulder, hitting assured in the face. The latter fell backward, fracturing his skull on the pavement. Thompson and the showman gave him immediate attention, helped him to his feet, and took him to a railway station a short distance away, where he died. The blow struck by Thompson did not seriously injure assured's face. Death was caused by the injury on the back of his head. Thompson intended to strike assured. The evidence of these facts is uncontradicted. An intention on the part of Thompson to kill assured is not shown.

Under these facts can a recovery in excess of \$100 be sustained without disregarding the terms of the policy? Defendant admits that decedent was insured against what actually occurred, but insists that its liability was limited by the contract to one-fifth of the face of the policy. Plaintiff argues that, since there is no proof of an intention on the part of Thompson to kill assured, his death was an accident entitling the beneficiary to a full recovery. In this connection it is contended by plaintiff that the words "wholly or in part," as they appear in the clause, "where the injury causing the loss results *wholly or in part* from voluntary exposure to unnecessary danger or obvious risk of injury." refer alone to the "exposure" and the "risk" mentioned in the clause in which they are used, and do not

modify "intentional act." The context, the grammatical construction, and the use of the disjunctive "or" between prepositional phrases which relate to the same subject condemn plaintiff's interpretation. It is clear that the words "wholly or in part" have the same relation to "intentional act" as they have to "voluntary exposure" and to "obvious risk." The words "wholly or in part" cannot be disregarded in their relation to "intentional act." No other construction is permissible. The inquiry is therefore reduced to this: Did the death of assured result wholly or in part from the intentional act of Thompson?

To sustain the proposition that the injury causing the death of assured "resulted from the sidewalk blow, and not from Thompson's intentional act," plaintiff cited a number of cases to which reference follows: In *Railway Officials & Employees Accident Ass'n v. Drummond*, 56 Neb. 235, the policy provided that the insurer "shall not be liable for injuries resulting from the intentional acts of the insured or any other person, or death resulting from such acts." The policy, so far as the report shows, contained no provision that, where the injury causing the loss results wholly or in part from the intentional act of the assured or of any other person, the assurer's liability shall be one-fifth of the amount otherwise payable. Assured was shot by a highwayman under circumstances indicating that the assassin's pistol was accidentally discharged. The terms of the policy and the facts, therefore, differ in material respects from those in the present case. Other cases cited by plaintiff are: *Richards v. Travelers Ins. Co.*, 89 Cal. 170; *Utter v. Travelers Ins. Co.*, 65 Mich. 545; *Manufacturers Accident Indemnity Co. v. Dorgan*, 58 Fed. 945; *Crandal v. Accident Ins. Co.*, 27 Fed. 40; *Accident Ins. Co. v. Crandal*, 120 U. S. 527. Each of these cases is distinguishable from the present one, either in the terms of the policy or in the facts.

As already stated, Thompson said, "I can lick you," and struck assured in the face, the latter falling backward and fatally fracturing his skull on the pavement. The in-

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tention to strike is shown without contradiction. How can it be said that the injury causing the death of assured did not result wholly or in part from the intentional act of Thompson in striking him? Except for the blow in the face he would not have fallen and the injury causing his death would not have occurred. For the injury resulting in the loss in this case, the policy, under the uncontradicted evidence, made provision for payment of one-fifth of the amount otherwise payable. This conclusion is supported by the reasoning in analogous cases. *Mossop v. Continental Casualty Co.*, 137 Mo. App. 399, 118 S. W. 680; *Carr v. Pacific Mutual Life Ins. Co.*, 100 Mo. App. 602, 75 S. W. 180; *Shader v. Railway Passenger Assurance Co.*, 66 N. Y. 441; *Furry's Adm'r v. General Accident Ins. Co.*, 80 Vt. 526, 68 Atl. 655; *Fidelity & Casualty Co. v. Smith*, 31 Tex. Civ. App. 111, 71 S. W. 391; *Travelers Protective Ass'n v. Weil*, 40 Tex. Civ. App. 629; *Matson v. Travelers Ins. Co.*, 93 Me. 469, 45 Atl. 518. It follows that the judgment is reversed, with directions to the district court to enter a judgment in favor of plaintiff for \$100; the costs in both courts to be taxed to him.

REVERSED.

BARNES, SEDGWICK and HAMER, JJ., not sitting.

STATE OF NEBRASKA, PLAINTIFF, V. WOODRUFF BALL ET AL.,
DEFENDANTS.

FILED JUNE 16, 1913. No. 16,050.

New Trial: Costs. Defendant was awarded a new trial for newly discovered evidence on condition that he pay the costs of all new witnesses produced by him in any event. *Held*, That such condition was improperly imposed, and on judgment in favor of defendant all of the costs were properly taxed against plaintiff.

OPINION on motion for rehearing and to retax costs of case reported in 93 Neb. 358. *Motion overruled.*

FAWCETT, J.

Judgment was rendered and opinion filed March 14, 1913, 93 Neb. 358. Plaintiff has filed motion for a new trial and to retax costs. Upon due consideration of the motion for a new trial, the same is overruled.

There have been two trials in this case. Upon the first trial the judgment was in favor of plaintiff. 90 Neb. 307. A motion for a new trial was filed and granted March 12, 1912, on the ground of newly discovered evidence. Upon consideration of the motion it was ordered: "That said motion be, and the same hereby is, sustained on condition that said defendant pay the costs of all new witnesses produced by him in any event." The case was then referred to a referee to take additional testimony and report findings of fact and conclusions of law. The report of the referee was favorable to defendant, and upon due consideration the report was approved and judgment entered accordingly. The clerk taxed all of the costs against the plaintiff. Plaintiff now urges that under the order of March 12, 1912, the costs of all new witnesses produced by defendant should be taxed to him. The defendant urges that our order of March 12 should not have been entered, and that under the statute he is entitled to recover his costs. Upon due consideration defendant's contention is sustained. Our order of March 12, 1912, is therefore vacated and set aside, and plaintiff's motion to retax costs is

OVERRULED.

LETTON, J., not sitting.

ROSE, J., dissents.

SYLVAN M. PAYNE, APPELLEE, v. GEORGE H. RISSE ET AL.,
APPELLANTS.

FILED JUNE 16, 1913. No. 17,229.

Appeal: REVERSAL. A verdict which is unsupported by any competent evidence is insufficient to sustain a judgment based thereon.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Reversed and dismissed.*

D. J. Flaherty and George H. Risser, for appellants.

J. A. Brown, contra.

FAWCETT, J.

This action originated in justice court. From a judgment of the district court for Lancaster county, in favor of plaintiff, defendants appeal.

The petition in the district court alleged that defendant Risser, police judge of the city of Lincoln, defendant Rhode, health officer of the city, and defendant Paine, president of the Lancaster County Humane Society, in the month of May, 1909, "entered into an unlawful conspiracy against the plaintiff, and wickedly, wilfully, maliciously and unlawfully conspired together with the intent and for the purpose of destroying the property of the plaintiff;" that on the 20th of that month plaintiff was leading a horse on Tenth street when defendants Risser and Rhode, and other persons to plaintiff unknown, came out of the police station "with guns and revolvers, and surrounded the plaintiff and his said horse," and that defendant Paine, pretending to act under and by virtue of his position as president of the humane society, and defendant Rhode, pretending to act under and by virtue of the order and direction of defendant Paine, "and acting in pursuance of said unlawful conspiracy, so entered into as aforesaid," took the horse from the possession of plaintiff, and then and there shot and killed him. The answer consists of an objection to the jurisdiction of the district court for the reason that no judgment was entered in justice court, and a general denial.

The objection to jurisdiction was properly overruled. While the judgment entered by the justice was not in precisely the usual form and was not accurately worded, we think it was sufficient.

The fourth assignment of error is that the verdict is not sustained by the evidence. This assignment goes to the real merits of the case, and is the only one necessary to be considered. The evidence shows that the horse had been tied to a piece of 2 by 4; that she became frightened and pulled back, pulled the piece of 2 by 4 off, and started to run with it dangling to the tie strap; that it swung around and penetrated one of her thighs above the stifle, on the inside, making a hole about nine inches in depth. Plaintiff then took her to a barn, where she was treated by Doctor Reeves, a veterinarian. She remained under his treatment for about three weeks. The doctor testified that, when plaintiff came for the mare, "I told Payne it would be hard for her to travel, and that he had better take her home in a wagon, but Payne thought he had better take her out a short distance and leave her. I told Payne that if he would get her in a pasture where she could get green grass it would be better for her than dry feed. I thought the mare had improved, and that her chances of recovery were good. I did not think the wound had affected the mare for breeding purposes. I thought if the mare recovered entirely she would be worth \$120 or \$125 or something like that." On cross-examination he testified: "If the mare recovered she would be worth as much as she ever was; if she did not recover she would not be worth anything—she would die." Plaintiff testified that the barn where the mare was being treated was less than a block from the police station; that on the day she was killed he was leading her home; that while opposite the police station Judge Risser came out and stopped him and sent for defendant Paine; that when Paine arrived he said the mare should be killed, and defendant Rhode killed her. When interrogated as to her value, he testified: "I base my valuation on the market value and what she was worth to me, and I would put her at \$125. The mare was eight years old past. She was worth \$125 to me. I do not think she would sell for \$125 in her condition; but then we would have to wait and see how she would come out. She was worth that to

me. I don't know what she would sell for." He also testified that there were no bones broken. Plaintiff called his brother-in-law, E. C. Graves, as a witness. He testified: "I never saw the mare after she was hurt. The nature and extent of the injury would affect the market value. She would be worth \$125, assuming that she would get well." J. E. Graves, brother of the preceding witness, testified that the mare was worth \$125 before she was injured; that, "if she would recover from the injury so that she could do the same work she did before, she would be worth \$125." This was the only evidence offered by plaintiff as to the value of the mare at the time she was killed. Upon that question, it was no testimony at all. Plaintiff and all of his witnesses coupled with their valuation of \$125 the condition that she would be worth that sum "if she recovered," or, as the doctor put it, if she "recovered entirely." As against this testimony, defendants introduced eight witnesses who testified that the mare in her then condition had no value at all. As against the doctor's testimony that he thought the mare's chances of recovery were good, seven witnesses testified that in their judgment she could never have recovered; and two or three other witnesses testified to facts in relation to her condition which strongly corroborate this testimony. There is a total failure of evidence to show that the mare was of any value at the time she was killed. She was so badly crippled that on the day she was shot, which was about three weeks after she was injured, she walked on three legs, was weak and reduced in flesh, and had other sores on her hip and body, the result doubtless of her struggles in the barn. This is not a case where a verdict should be sustained on the ground that it was rendered upon conflicting evidence. The verdict is so clearly without any competent evidence to sustain it that it should not be permitted to stand.

The allegation in the petition that defendants entered into a conspiracy to destroy plaintiff's property is not worthy of serious consideration. On the contrary, the evidence shows that they acted in the utmost good faith, in

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the performance of what they believed to be their official duty, and they should not be further harassed.

Plaintiff's case is so clearly without merit that the judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

LETTON, ROSE and HAMER, JJ., not sitting.

LUCIA R. DILLENBACH, APPELLEE, v. SYLVESTER S. SNYDER,
APPELLANT.

FILED JUNE 16, 1913. No. 17,245.

1. **Errors** assigned, but not shown in the abstract, will not be considered.
2. **Appeal:** **CONFLICTING EVIDENCE.** A verdict based upon conflicting evidence, and approved by the trial court, will not be disturbed, unless manifestly wrong.

APPEAL from the district court for Adams county:
HARRY S. DUNGAN, JUDGE. *Affirmed.*

John C. Stevens, for appellant.

J. W. James and *H. F. Favinger*, *contra.*

FAWCETT, J.

This action was instituted in the district court for Adams county to recover money delivered to defendant's agent in connection with what plaintiff contends was a proposal to purchase certain real estate in the city of Hastings. From a verdict and judgment in favor of plaintiff, defendant appeals.

The substance of the petition is that plaintiff, being desirous of purchasing some residence property, visited the office of Higginbotham & Pickens, real estate agents, and

requested the senior member of the firm to show her some residence property. He showed her the property of defendant, and told her the price thereof was \$4,600. She declared her willingness to take the property at that price, and left with the agent a certificate of deposit for \$900, the agent giving her a receipt which recited the purchase price, the amounts and the dates of the different payments, and that the proposition was subject to the approval of the owner, the defendant in this action; that this was done June 2, 1909; that at 8 o'clock the next morning she withdrew her offer to purchase, and so notified the agent and demanded a return of her certificate of deposit; that the agent cashed the certificate and turned the money over to defendant; that before the trial the defendant sold and conveyed the property to a third party. The answer admits the agency of Higinbotham & Pickens; that appellee was desirous of purchasing property; that she examined the property of defendant; that defendant had later sold the property for \$4,100, and denies all other allegations in the petition. It then alleges that on June 2 plaintiff agreed to purchase the property for \$4,600, and as a part of the purchase money paid \$900 to the agents; that on the same evening the agents informed defendant of the sale, and he thereupon approved and accepted the terms of the sale and the said sum of \$900; that he was ready, able and willing to convey the property to plaintiff, and on the 1st of September, 1909, tendered to plaintiff a deed to the property, but she refused to comply in any manner with the conditions of the contract, and has never since offered or tendered performance of the same; "that by her conduct she forfeited her right to have paid back to her said \$900." The reply was a general denial.

We think the issues in this case are well stated by counsel for defendant in his brief: "To simplify the proposition, in my opinion, the only question is: Did the appellee purchase the real estate described in the petition?" Plaintiff testified, in substance, that, when she went with the agent on June 2 to look at defendant's place, the agent told

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her the price was cash, and she told him she could not pay cash, but would make him this offer: That she would give \$900 cash, \$1,900 July 1, and \$1,800 September 1; that the agent said he would take the \$900, but would have to get the owner's approval; that she thereupon gave him the \$900 certificate, and he gave her the receipt. The receipt reads: "Hastings, Neb., June 2d, 1909. Received from Miss Lucia R. Dillenbach nine hundred dollars on purchase of S. S. Snyder property on 7th St. between Hastings & Denver Ave. at \$4,600 Bal to be paid 1900 July 1st, '09 and balance 1800 Sept. 1, '09 at which time possession to be given. Subject to approval of S. S. Snyder. (Signed) Higinbotham & Pickens, Agents." It is apparent that up to this point the minds of the parties had not met in a completed contract. The most that can be claimed for the receipt given by the agent, which is the only written evidence of what was done, is that plaintiff submitted to defendant through his agents a proposal to purchase his residence property for the sum stated and upon the terms named in that receipt; that this proposal was subject to the approval of defendant. The only disputed question of fact, therefore, is: Did the plaintiff, before she was advised of the acceptance of this offer, distinctly and unqualifiedly withdraw the same? Upon this, the evidence is in sharp conflict. The jury found in favor of the plaintiff, and thereby found that the withdrawal of the offer was made before notice was given of its acceptance, and that therefore no completed contract was ever entered into between the parties. This being true, the plaintiff was entitled to a return of her money with interest, as found by the jury.

Complaint is made of certain instructions given by the court. The appeal was lodged in this court and abstract and briefs filed during the time that the law and the rules of this court in relation to abstracts were in full force and effect. In No. 19 of the rules it was provided that, in the preparation of abstracts, "where no objection is made to the giving or refusing of any instruction, omit all, but,

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where there is objection as to the giving or refusal to give any instruction or instructions, set out the whole charge, pointing out specifically the instructions excepted to." This requirement of the rules was not followed in the preparation of defendant's abstract, only a portion of the court's charge being set out. This assignment of error will therefore be disregarded. Complaint is made of the refusal of the court to give instructions 1, 2, 3 and 4, requested by defendant. As the charge of the court is not set out, we must assume that the points covered by these four instructions were fully embraced therein. In fact, that portion of the instructions given by the court, set out in the abstract, shows such to have been the case.

Summed up, the case turns entirely upon a question of fact, as to which the evidence is in conflict. The jury saw the witnesses upon the stand and heard them testify. They saw fit to give credit to the evidence offered by plaintiff and to discredit that offered by defendant. No good reason is shown why we should say that the jury were wrong in so doing.

AFFIRMED.

LETTON, ROSE and HAMER, JJ., not sitting.

COHN-GOODMAN COMPANY, APPELLANT, V. MANDELSON & GOLDSTEIN, APPELLEES.

FILED JUNE 16, 1913. No. 17,246.

1. **Sales: CONDITION: RETURN OF GOODS.** If a manufacturer sells goods to a retail dealer with a condition in the contract that the dealer may return anything that is not entirely satisfactory, he cannot complain if the dealer, upon receipt of the goods, makes a reasonable attempt to dispose of the same before availing himself of the condition of return.
2. **Review.** The record examined, and found to contain no prejudicial error.

APPEAL from the district court for Otoe county: HARVEY D. TRAVIS, JUDGE. *Affirmed.*

Pitzer & Hayward and Edwin Zimmerer, for appellant.

Logan F. Jackson, contra.

FAWCETT, J.

This action was instituted in the district court for Otoe county to recover a balance of \$187.50, claimed to be due upon an account for ladies' suits and coats. From a verdict and judgment in favor of defendants, plaintiff appeals.

A number of assignments are set out and argued at great length. We do not deem it necessary to refer to them, for the reason that, as we view the case, it turns upon a very simple proposition.

Defendants in their answer allege that one of the conditions of the purchase of the goods in question was that if they were not satisfactory defendants might return them to plaintiff. The witness Kennedy, manager of the ladies' department of defendants' store, testified to such agreement. In this he was corroborated by two other witnesses. Notwithstanding the fact that this testimony is uncontradicted, the court submitted the question to the jury under an instruction that to relieve the defendants from liability they must have had some substantial reason for declining to retain any of the goods. This was certainly all that plaintiff could ask. The evidence shows that defendants received 28 coats and suits in four consignments, the first being shipped October 28, the second November 4, the third November 6, and the fourth November 10, 1909. About two weeks later defendants returned 14 of the coats and suits, assigning two reasons for so doing. The package arrived at plaintiff's office on November 30. Upon receipt of the package plaintiff sent the goods to its attorneys at Nebraska City, and notified defendants that the package "has been refused for the reason that *they* consider that the reasons for the return do not exist." On December 15 defendants returned two more of the coats. Upon receipt of this package, plaintiff again wrote defendants refusing to accept the same. The evidence also

shows that defendants mailed plaintiff a check to cover the goods not returned. Plaintiff refused to accept the check, and returned the same to defendants, not because it was a personal check, but because it was not in full of account. Mr. Goldstein, one of the defendants, testified: "That check is still at the disposal of plaintiff." Thus matters stood at the time of the trial. As stated by counsel for defendants: "Properly speaking, there is in this case no question of *rescinding* the contract. It was the exercise, by the defendants, of the right to return any unsatisfactory goods." In other words, defendants are not attempting to rescind the contract, but are standing upon and asserting their rights under it.

The fact that upon receipt of the goods they did not at once return them, but remitted for the first consignment and placed the other goods upon sale, and tried for some two or three weeks to sell them, seems to us immaterial. If they, in good faith (of which the jury were the judges), tried for a reasonable length of time to sell the goods and found that they were unable to do so because of certain defects in their make-up, and for that reason the goods were unsatisfactory to them, they should not thereby be estopped from availing themselves of the condition of the contract, which was: "Anything you get from us that is not entirely satisfactory you can return it." If plaintiff saw fit to sell these goods to defendants with such a condition in the contract, it ought not to complain because defendants made a reasonable attempt to dispose of the goods, before availing themselves of the condition. A check for all goods sold is still at plaintiff's disposal. It agreed that defendants might "return any unsatisfactory goods." The goods not sold were unsatisfactory to defendants. They were all returned and are now in plaintiff's possession. This seems to be a case where the doctrine of substantial justice applies.

AFFIRMED.

LETTON, ROSE and HAMER, JJ., not sitting.

ARAPAHOE STATE BANK, APPELLANT, v. LOLA H. MCKENNA, APPELLEE.

FILED JUNE 16, 1913. No. 17,247.

Appeal: RECORD. The condition of the record, as shown in the opinion, held to contain no prejudicial error.

APPEAL from the district court for Furnas county:
ROBERT C. ORR, JUDGE. *Affirmed.*

Morning & Ledwith and F. W. Byrd, for appellant.

W. S. Morlan, contra.

FAWCETT, J.

Plaintiff brought suit in the district court for Furnas county to recover balance due on a promissory note. The defense relied upon by defendant is that plaintiff and other creditors obtained from her a transfer of all her property under an agreement that such property, when delivered to one Finch, trustee, should be accepted by such creditors in full settlement of their demands. There was a trial to a jury. Verdict and judgment for defendant, and plaintiff appeals.

The grounds relied upon in plaintiff's brief for a reversal are: "(1) That the verdict is absolutely unsupported by the evidence. (2) That the court erred in giving instruction No. 4, there being no evidence tending to establish any of the questions of fact therein involved. (3) The court erred in permitting the introduction of the petition above referred to in evidence." The bill of exceptions contains 15 closely written pages of testimony, and a number of exhibits. The abstract of the same, omitting the conclusions of counsel, is less than one page. None of the exhibits is abstracted, nor is the testimony of the witnesses sufficiently set out to give the court any fair understanding of the case. We have examined the bill of exceptions far enough to show that the abstract

does injustice to defendant, when it states: "There is nothing in the record except the contents of the answer written by Morlan that even indicates an agreement to accept the property of the defendant in full discharge of the debts due the creditors." On page 14 of the bill of exceptions defendant testifies that, when plaintiffs were trying to induce her to sign the trust deed of all of her property to Finch, "they said if I would sign that trust deed they would leave my property alone, and they wouldn't bother my property, and I would have some money left." We cannot say from the record presented to us that the verdict is not sustained by the evidence.

By instruction No. 4, complained of, the court instructed the jury: "If you find from the evidence that the plaintiff secured the execution of the trust deed introduced in evidence through and by representations that it was to defendant's interest to execute the same, and that she would be relieved the same as if she was adjudged a bankrupt, or if it was agreed between plaintiff and defendant that she should execute the said trust deed and that the same should be taken as payment of defendant's indebtedness, then your verdict should be for the defendant." The testimony of defendant, quoted above, fairly sustains the allegation of her answer, and justified the giving of instruction No. 4. The third assignment, that the court erred in permitting the introduction of certain exhibits, cannot be considered, as neither the exhibits nor their substance are set out in the abstract.

Plaintiff having failed to point out any prejudicial error, the judgment of the district court is

AFFIRMED.

LETTON, ROSE and HAMER, JJ., not sitting.

HENRY R. POPEJOY, APPELLEE, v. EDWIN E. BURR,
APPELLANT.

FILED JUNE 16, 1913. No. 17,248.

Appeal: AFFIRMANCE. "Where the verdict returned is clearly right and is the only one warranted by the evidence, the judgment will be affirmed, although errors may have intervened at the trial."
United States School-Furniture Co. v. School District, 56 Neb. 645.

APPEAL from the district court for Webster county:
HARRY S. DUNGAN, JUDGE. *Affirmed.*

Bernard McNeny, for appellant.

L. H. Blackledge, contra.

FAWCETT, J.

Plaintiff brought suit in the district court for Webster county to recover the value of two mares and a mule colt, stolen from him across the line in Kansas, which animals he alleged were sold to defendant and by defendant resold without his knowledge or permission, of the alleged value of \$400. The answer was a general denial. From a verdict in favor of plaintiff for \$300 and judgment thereon, defendant appeals.

The principal contentions here are: The identity of the larger of the two mares; that the court erred in some of the instructions given upon its own motion and in refusing certain other instructions tendered by defendant; errors of the court in the admission and exclusion of evidence; and that generally the evidence is insufficient to sustain the verdict. We have carefully examined the abstract prepared by defendant, and are unable to see how, so far as the identity of the animals in controversy is concerned, any other verdict could be sustained than the one returned by the jury. On the question of the value of the animals, the evidence is in sharp conflict. There is testimony in the record which would have supported a larger verdict.

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There is also testimony which would have supported a verdict for a considerably less sum. The jury saw the witnesses upon the stand, heard them testify, and, under the well-settled practice, their verdict must control. It would serve no good purpose to discuss the rulings of the court upon the introduction and exclusion of evidence, or as to the giving and refusal of instructions, as we do not see how the errors complained of could have in any manner changed the result. The defendant was evidently an innocent victim of a horse thief, but he seems to have had a fair trial, and must stand the consequences of the fraud practiced upon him.

AFFIRMED.

LETTON, ROSE and HAMER, JJ., not sitting.

HENRY GAWEKA, JR., v. STATE OF NEBRASKA.

FILED JUNE 16, 1913. No. 17,826.

1. **Indictment and Information: SUFFICIENCY.** An information or complaint must charge explicitly all that is essential to constitute the offense. It cannot be aided by intendment, nor by way of recital or inference, but must positively and explicitly state what the accused is called upon to answer.
2. ———: ———: **RESISTING OFFICER.** A complaint under section 30 or the criminal code for resisting a municipal officer while attempting to make an arrest without a warrant, which does not allege that the offense was committed within the limits of the municipality of such officer, is fatally defective.

ERROR to the district court for Thayer county: LESLIE G. HURD, JUDGE. *Reversed.*

Charles H. Sloan, Frank W. Sloan, J. J. Burke and J. T. McCuiston, for plaintiff in error.

Grant G. Martin, Attorney General, and Frank E. Edgerton, contra.

FAWCETT, J.

From a conviction in the district court for Thayer county, of a misdemeanor in resisting an officer, and a fine of \$1, the accused, whom we will designate as defendant, has prosecuted error to this court.

The amended complaint, under which defendant was tried and convicted, charges that defendant "did unlawfully and wilfully resist, abuse, strike, and threaten to do bodily harm to the said M. O. Weidenheimer, village marshal of the village of Bruning, while the said officer was in the lawful performance of his duties as village marshal, and in the proper execution of his office; said Henry Gaweka, Jr., knowing said M. O. Weidenheimer to be village marshal of the village of Bruning, contrary to the form of statutes," etc.

The first point urged for reversal is that the complaint is insufficient, in that it does not allege where the offense was committed, further than to aver that it was in Thayer county. This point is well taken. It is conceded that the marshal did not have a warrant for the arrest of defendant, but it is alleged in the complaint that the arrest was attempted to be made "for disturbing the peace and attempting to provoke an assault, same being done in the presence of the said village marshal." As a village marshal the officer would have no authority, without a warrant, to make such arrest outside of the limits of his municipality. If he attempted to do so, defendant would be justified in resisting with all reasonable and necessary force. It will be observed that the complaint nowhere alleges that the offense was committed in the village of Bruning, of which the officer was the marshal. But it is said, the statement in the complaint that the marshal was in the performance of his usual duties as marshal of said village, and was in the lawful execution of his said office as village marshal, in making the arrest, is sufficient; that the officer could not lawfully arrest any one outside of the limits of his jurisdiction, and if he was in the law-

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ful execution of his office he must have been within the limits of the village. In other words, we are asked to aid the complaint by construction or inference, and hold that an offense under section 30 of the criminal code has been alleged. This is not the law in this state. In *Moline v. State*, 67 Neb. 164, we held that an indictment or information "must charge explicitly all that is essential to constitute the offense. It cannot be aided by intendment, nor by way of recital or inference, but must positively and explicitly state what the accused is called upon to answer." As far back as *Smith v. State*, 21 Neb. 552, we held: "A complaint must charge explicitly all that is essential to constitute the offense, and it cannot be aided by intendments." *Smith v. State* has since been cited with approval in numerous decisions of this court. In *Seifried v. Commonwealth*, 101 Pa. St. 200, it is held that "where the offense is statutory, and can be committed only in a certain municipal division, which is less than the county within the jurisdiction of the court, the name or description of such division, and the fact that the offense was committed therein, must be set forth in the indictment."

Under the authorities above cited, the information in this case is insufficient. The judgment of the district court is therefore reversed and the cause remanded.

REVERSED.

LETTON, ROSE and HAMER, JJ., not sitting.

JOSEPH W. GRIFFITH ET AL. V. STATE OF NEBRASKA.

FILED JUNE 16, 1913. No. 17,957.

Larceny: VERDICT: VALUE OF PROPERTY. In a prosecution for cattle stealing under section 117a of the criminal code, the jury are not required to ascertain and declare in their verdict the value of the cattle stolen. *Fisher v. State*, 52 Neb. 531, and *Holmes v. State*, 58 Neb. 297, overruled.

ERROR to the district court for Morrill county: RALPH W. HOBART, JUDGE. *Affirmed: Sentence modified.*

E. D. Clark and M. F. Harrington, for plaintiffs in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton*, *contra*.

FAWCETT, J.

From a judgment of conviction in the district court for Morrill county, of the crime of cattle stealing, defendants have prosecuted error to this court.

The information charges plaintiffs in error, who will be referred to as defendants, with having stolen two red steers of the age of four years and of the value of \$160, the property of Frank F. Peterson. The jury returned the following verdict: "We, the jury, duly impaneled and sworn in the above entitled cause, do find the defendants Joseph W. Griffith, Jr., and Joseph W. Griffith guilty of stealing cattle in manner and form as charged in the information. And we earnestly recommend that the court fix as light a sentence upon the defendants as the law in the case will permit." As to defendant Joseph W. Griffith, Jr., the court adjudged that sentence should be suspended and the defendant released on parole. Defendant Joseph W. Griffith was sentenced to confinement in the penitentiary for a period of not less than three nor more than ten years, and pay the costs of prosecution. No exceptions were saved by defendants during the progress of the trial, nor was any motion for a new trial filed or bill of exceptions settled, so that the case stands before us on the information, the verdict of the jury, and judgment. The sole question presented is that the court erred in entering judgment at all against either of the defendants, for the reason that the verdict does not fix any value on the property alleged to have been stolen.

Defendants were prosecuted under section 117a of the criminal code, which provides: "If any person shall steal

any cow, steer, bull, heifer, or calf, of any value, * * * every such person so offending shall be imprisoned in the penitentiary not more than ten years nor less than one year, and shall pay the costs of prosecution." This section of the code was adopted in 1895, and took effect July 6 in that year. Defendants rely upon *McCoy v. State*, 22 Neb. 418, *McCormick v. State*, 42 Neb. 866, *Fisher v. State*, 52 Neb. 531, *Holmes v. State*, 58 Neb. 297, and *Armstrong v. State*, 21 Ohio St. 357. *McCoy v. State* and *McCormick v. State* were both decided prior to the enactment of the section under consideration. At that time cattle stealing came under the general provisions of the criminal code as to larceny. Under the law as it then stood, a verdict like the one in the case at bar would be insufficient. *Fisher v. State* was a prosecution for cattle stealing. The offense was alleged to have been committed September 30, 1895, which it will be observed was shortly after the section under consideration took effect. The verdict in that case is similar to the one in the case at bar, in that it failed to find the value of the cattle stolen. The syllabus in that case reads: "A verdict of guilty in a prosecution for larceny is fatally defective, which omits to find the value of the property alleged to have been stolen. *McCoy v. State*, 22 Neb. 418, followed." The discussion of the case by the writer of the opinion is very brief, and clearly shows that the court did not have in mind the new section of the criminal code. This appears from the fact that the opinion cites only section 488 of the code, and *McCoy v. State* and *McCormick v. State*, *supra*. After citing those two cases the opinion concludes (p. 532): "The case at bar is ruled by those decisions." This was an oversight on the part of the court and of the learned judge who wrote the opinion. The prosecution in that case was not under the code as to larceny generally, but under a distinctly independent section of the criminal code, complete within itself, which made the crime charged a definite and substantive crime, to be dealt with independently of the general provisions of the code as to larceny (*Wallace v. State*, 91 Neb. 158),

and the case could not properly and should not have been held to be ruled by those decisions.

Holmes v. State, supra, was a prosecution under section 113a of the criminal code, enacted in 1887, which provides: "Every person who steals property of any value by taking the same from the person of another without putting said person in fear by threats or the use of force and violence, shall be deemed guilty of grand larceny, and shall, upon conviction thereof, be punished by confinement in the penitentiary for not less than one nor more than seven years." The verdict in that case found "the said defendant guilty of larceny from the person, as she stands charged in the information." Paragraph 1 of the syllabus reads: "A general verdict of guilty of the crime of larceny from the person, from which is omitted a statement of the value of the property alleged to have been stolen, is fatally defective." In that case, as in *Fisher v. State, supra*, the court proceeded upon the theory that section 488 applied. The cases cited in the opinion are *McCoy v. State*, *McCormick v. State*, *Fisher v. State*, and *Armstrong v. State, supra*.

In *Armstrong v. State*, the Ohio court seems to have fallen into the same error as this court did in *Fisher v. State* and *Holmes v. State*, viz., in holding that the case was governed by section 167 of their criminal code, which is substantially the same as our section 488, notwithstanding the fact that by the twenty-seventh section of the Crimes Act horse stealing was made a penitentiary offense, "whatever may be the value of the animal stolen." The position of the Ohio court in a case of larceny from the person (which was *Holmes v. State*) is made clear in *Harris v. State*, 57 Ohio St. 92, and *State v. Whitten*, 82 Ohio St. 174, where it is distinctly held that a verdict upon the trial of an indictment for pocket picking which finds the defendant guilty of pocket picking in manner and form as charged in the indictment is sufficient to sustain judgment and sentence, although such verdict does not find and return the value of the property taken. It is true *Armstrong v. State* is not overruled in either *Harris v. State*,

or *State v. Whitten*, but is distinguished as involving an offense against property, while the two later cases involve crimes against the person. This distinction is drawn from the fact that larceny is provided for in chapter 4, under the subtitle of "Crimes against Property," while pocket picking is provided for in chapter 3 of title 1 of the penal subdivision of the statutes, entitled "Crimes against the Person."

We deem it unnecessary to enter into a discussion of the provisions of the Ohio law referred to, or of the distinction drawn by that court, preferring to determine the case upon careful consideration of our own code in an effort to get right in its construction. We think this court went wrong in *Holmes v. State*, and on reading *Keller v. Davis*, 69 Neb. 494, we discover that this is not the first time we have doubted the soundness of that case. In the case just cited, in commenting upon section 488, *supra*, the opinion says (p. 496): "Our attention has not been called to any decision expressly holding that the section quoted is applicable to the larceny of horses, yet, by analogy at least, *Holmes v. State*, 58 Neb. 297, holds that it is, and, in the further consideration of this case, we will assume that it is." But in paragraph 2 of the syllabus it is held: "Whether the provisions of section 488 of the criminal code, requiring the jury to ascertain and declare in their verdict the value of the property stolen, apply to prosecutions had under section 117 of the criminal code, *quære*." Upon a careful consideration of section 117 of the criminal code, and of our former decisions, we are all of the opinion that the query contained in *Keller v. Davis*, *supra*, should now be definitely answered and that section given the full force and effect evidently intended by the legislature when it was enacted. Section 117 makes horse stealing a felony, without regard to the value of the animal stolen. Section 117a makes the same provision as to cattle stealing; section 117b the same as to hog stealing; and section 117c the same as to the stealing of chickens and other domestic fowls. Prior to the enactment of these sections, section

488 required the jury to find the value of the property stolen. This was necessary in order to determine the grade of the crime—whether grand or petit larceny. By the new sections the stealing of any of the animals or fowls enumerated is made a felony, without reference to value. The value has nothing to do with determining the grade of the crime. It is therefore unnecessary, for that purpose, for the jury to find the value of the property.

There was formerly another reason why the jury should find the value of the property. Prior to the adoption of section 502a of the criminal code, known as the indeterminate sentence act, the trial court was vested with a large discretion in passing sentence upon one convicted of crime, within the limitation of the maximum and minimum penalty fixed by statute. Then the verdict of the jury as to the value of cattle stolen would aid the court in determining the degree of punishment to be inflicted. The court would not be likely to sentence one convicted of stealing a calf of the value of \$10 to as long a term of imprisonment as one who had been convicted of stealing a number of animals of considerable value; but that is all changed by section 502a, which provides that every person over the age of 18 years, convicted of a felony or other crime punishable by imprisonment in the penitentiary, excepting murder, treason, rape and kidnapping, "shall be sentenced to the penitentiary; but the court imposing such sentence shall not fix the limit or duration of the sentence, but the term of imprisonment of any person so convicted shall not exceed the maximum nor be less than the minimum term provided by law, for the crime for which the person was convicted and sentenced; the release of such person to be determined as hereinafter provided." By succeeding sections the matter of release is placed in the hands of the state prison board. There being no longer any reason for requiring the jury to find the value of the property stolen, and section 117a of the criminal code making the larceny of cattle a felony, regardless of value, we see no reason why the value should be stated in the verdict. We there-

fore hold that, in a prosecution for cattle stealing under section 117a of the criminal code, the jury are not required to ascertain and declare in their verdict the value of the cattle stolen. *Fisher v. State*, 52 Neb. 531, and *Holmes v. State*, 58 Neb. 297, are overruled.

In one respect the district court erred. The penalty provided by section 117a, in case of conviction, is imprisonment in the penitentiary for not more than ten years nor less than one year. Section 502c of the criminal code authorizes the state prison board to establish rules and regulations by which prisoners within the penitentiary may be allowed to go upon parole at any time after "the minimum term fixed by law for the offense has expired." This would entitle the defendants to be permitted to go upon parole at the expiration of one year. The court, however, in passing sentence upon defendant Joseph W. Griffith, fixed the minimum at three years, thus depriving him of two years of time within which the prison board might permit him to go upon parole. This right to parole is a substantial right, of which one convicted of crime cannot be deprived by the court. While holding that it is not within the power of the district court to fix the minimum of the sentence at a greater period than that fixed by law, we do not at this time decide that the court may not fix the maximum at less than that fixed by law. The reason for this distinction is obvious.

For the reasons above stated, the minimum penalty of three years, fixed by the sentence and judgment of the district court, is reduced to one year, and in all other respects the judgment is

AFFIRMED.

J. C. YORK & COMPANY, APPELLEE, v. W. J. BOOMER ET AL.,
APPELLANTS.

FILED JUNE 16, 1913. No. 17,040.

1. Trial: INSTRUCTIONS. If the issue is fairly presented to the jury in a proper instruction, the judgment will not be reversed because the same issue was incompletely and defectively stated in another instruction, unless it affirmatively appears that the complaining party was prejudiced thereby.
2. ———: ———. In an action to rescind or annul a contract for fraud, if the plaintiff alleges several grounds for such relief, a verdict in his favor will not be set aside because of error of the trial court in withdrawing from the jury a part of plaintiff's cause of action; sufficient remaining to justify the verdict. Such error is without prejudice to the defendant.
3. Contracts: SUIT TO RESCIND: EVIDENCE. The evidence is found to be sufficient to support the verdict of the jury.

APPEAL from the district court for Kearney county:
HARRY S. DUNGAN, JUDGE. *Affirmed.*

Adams & Adams, for appellants.

F. L. Carrico and J. L. McPheely, contra.

SEDGWICK, J.

This action was begun in the district court for Kearney county as an action in replevin, and a part of the property involved was taken under the writ. The plaintiff filed a petition which is in form a petition in equity to rescind or annul a contract which the plaintiff claims was obtained by fraud, and under which the defendants obtained possession of the property. The cause was submitted to a jury, and there was a verdict and judgment for the plaintiff, and the defendants have appealed.

It does not appear from the briefs that there was any controversy between the parties as to the manner of the trial, and no objection is now made on that ground. The petition alleged that the plaintiff is the owner and entitled

to the immediate possession of a stock of harness and other goods constituting their stock in trade in Minden, Nebraska, of the value of \$3,800, and that the defendants wrongfully and unlawfully obtained the goods and chattels from the possession of the plaintiff. The petition then alleges that on the 17th day of June, 1910, the defendants represented that W. J. Boomer was the owner of a tract of land in Lincoln county, Nebraska, consisting of 320 acres, and represented that it was of the value of \$8,000, when in truth and in fact it was not of greater value than \$4,000; and represented that a purchaser for said land, one C. K. Gittings, had been secured who would enter into a contract to purchase the land for the sum of \$8,000, and that if the plaintiff would exchange its stock of goods for the defendants' land, the said Gittings would take the land and pay therefor the sum of \$8,000 and that thereupon two contracts were executed, by one of which contracts the defendants agreed to exchange the said land for the said stock of goods and the plaintiff agreed to give in exchange therefor the said stock of goods, valued at \$3,800, and to pay for the same \$1,200 on the 1st day of August, 1910, and then to take the land subject to two mortgages, one for \$1,400 and the other for \$600, and to secure the payment of the remaining \$1,000 of the purchase price of the land by a mortgage. By the other contract the plaintiff agreed to sell the said land to the said Gittings for the sum of \$8,000 "in the manner following; \$400 cash in hand paid, the receipt whereof is hereby acknowledged, and the balance as follows: \$4,600 on the 1st day of August, 1910, at which time second party is to assume one mortgage of \$1,400 and one mortgage of \$600 and one mortgage of \$1,000 now on or to be placed on said land, and the first party is on the 1st day of August to execute deed according to this contract subject to above described mortgages. * * * The said two contracts were * * * both at time of execution delivered into the possession of defendant W. J. Boomer, upon the express condition then and there made orally, and the delivery of same depended and the final

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consummation of said contracts upon giving same unto the possession of said W. J. Boomer, was that same be not finally delivered unless full and complete performance be made by all the parties to both contracts and that there be full and complete performance by said C. K. Gittings of all covenants and agreements contained in contracts executed by him. And relying upon said representations and believing same to be true, the said contracts as signed *was* given into the possession of defendant W. J. Boomer and plaintiff delivered said stock of goods." And that when said contracts were executed they were taken by the defendant Boomer and deposited in the bank, in accordance with the understanding of the parties, to remain on deposit until the 1st day of August, when the deeds were to be executed and the exchanges made, and that, when so taken by the said Boomer, each of the said contracts contained the following clause: "And in case of failure of the said party of the second part to make either of the payments or perform any of the covenants on his part hereby made and entered into this contract shall, at the option of the party of the first part, be forfeited and determined, and the party of the second part shall forfeit all payments made by him on this contract." And that afterwards the said defendants altered the said contract between the plaintiff and the said Gittings by erasing from the said clause thereof the words "at the option of the party of the first part," so as to reserve to the said Gittings the right to forfeit and determine the contract; and that, "at the time set for the performance of the conditions in said contract, the said C. K. Gittings refused and now refuses to perform the conditions contained in said contract, all as prearranged by and between them, the said C. K. Gittings, W. J. Boomer, and the W. J. Boomer Implement Company. And plaintiff elected to and by reason of the fraud on the part of said C. K. Gittings, W. J. Boomer, and the W. J. Boomer Implement Company, to rescind said contract, instituted these proceedings, and replevied the property herein described."

To this petition the defendants filed a general denial. The petition, perhaps, is not very artistically drawn, but no objection was made thereto, and there was no motion for a more specific statement, and the evidence, so far as is shown by the briefs, was taken in all respects as though the petition was sufficient.

The principal contention of the defendants in the brief is "that the verdict is wholly unsupported by the evidence and is contrary thereto." Boomer & Company were in the hardware business in Edgar, Nebraska. One Stanley was a traveling man, selling hardware, and, perhaps, other goods. He visited Minden and stopped at York's store. He told them he knew of a man who wanted to trade some land for a stock of goods. After some talk he wrote the name and address of Mr. Boomer on a piece of paper and left it with York. York wrote a letter to Boomer telling him that he understood that he wanted to exchange some land for a stock of goods, and that he had a stock of goods, etc. Boomer immediately called them up over the telephone, and right away afterwards called at their store. They went out to see the Boomer land, which was 320 acres, and Boomer priced it at \$25 an acre, being \$8,000. The stock of goods was then valued by the parties at about \$4,000. After looking over the land York told Boomer that he could not deal at all upon that basis, and that he could not take the land for the stock of goods, unless they could find a cash purchaser for the land. Soon afterwards Stanley, the traveling man, informed York that he had found a cash purchaser who would buy the land. This was Gittings, and not long afterwards Boomer and Gittings came together to see Mr. York. York testified that he told them when they were both together (that is, Gittings and Boomer) that he would not trade the stock for the land, unless the land was sold at the same time. He would not make one deal without the other. When Gittings and Boomer met in the presence of York, York introduced them. They told him then that they had never met, but soon afterwards York testifies that they told him they had

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talked the matter over before and had been acquainted some time. At all events, Gittings agreed to take the land at \$8,000. There is no explanation why they did not make the deeds at once and close up the business, but they agreed, as York says, that it should be closed up on the 1st of August, which was about a month later, and so, instead of making the deeds and closing up then, they made the two contracts. Under one contract Boomer agreed to sell the land to York, and in the other York agreed to sell the land to Gittings. These contracts were written upon identical blanks; they were written by some stranger at Hastings, and were dictated by Mr. Boomer. It was agreed that they should be in the bank until the deal was consummated and the deeds made, and that they should not be delivered to the parties until that time. When the contracts were completed Boomer put them both in his pocket and they all went to the bank. Boomer turned the contracts over to the bank. These blanks upon which the contracts were written contained the clause to the effect that, if the purchaser failed to carry out the contract, the seller, at his option, might forfeit the first payment and keep his land. It turned out afterwards, when Gittings refused to complete the contract and pay for the land as agreed, that the option clause in his contract had been erased and so changed that the purchaser was not compelled to take the land, but merely to forfeit his first payment; and as the first payment was only \$400 and the amount that York was paying for the land was over \$4,000 more than he regarded as its true value, Mr. Gittings concluded to let York have the \$400 and not take the land. Mr. York testified positively that he read both of these contracts at the time they were signed, and that when these contracts were put in Boomer's pocket this clause had not been erased. If the jury believed this testimony, it would mean that Gittings and Boomer, or one of them, changed the Gittings contract afterwards so that Gittings would not be compelled to take the land. This was quite important, as Gittings says he was worth \$75,000, and of course did not want to be com-

pelled to take the land unless he chose to do so. An arrangement of this kind, if it was as York claimed, and as the jury found, could not be proved by the direct evidence of witnesses who knew that they had agreed to so swindle Mr. York. Such transactions are always to be proved by circumstances that indicate fraud, and by the result of the deal. If the jury believed that the Gittings contract was so changed after Boomer took possession of it as to enable Gittings to avoid it by merely forfeiting the \$400, and believed that the contracts, as soon as executed, were taken by Boomer together and by him placed in the bank, they must have believed that the change was either made by Boomer, or that he knew it was made and knew the reason of its being made. It turned out that York bought the land, if this contract is carried out, with mortgages on it for more than he would be willing to pay for the land, and that he must pay \$1,200 in cash and give the stock of goods at \$3,800 and assume and give additional mortgages, so that the result is to defraud York of something more than \$4,000.

The defendants say in the brief: "Suppose it was true that this matter of the trade or trades had been prearranged by Boomer and Gittings, and neither of them ever said a word to the Yorks about it, or made any representations, or made any agreement that both deals should go through, and the trades had been made, just as they were, then in such case would there be actionable deceit or fraud?" Both of the Yorks testified that the agreement was that both contracts should go through or they would not make the exchange. They seem to be frank and straightforward in their testimony, and of course the jury were at liberty to believe them, though contradicted by the other parties to the alleged fraud. The jury believed York, and we cannot believe that they were so clearly wrong in so doing that we are compelled to set aside their verdict.

The court excluded some competent evidence offered by the plaintiff, and by its instructions withdrew from the jury some important issues presented by the petition and

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evidence. This was prejudicial to the plaintiff, but the defendants are not in a position to complain of these rulings. One of the instructions complained of by defendants was incomplete, but the issue above outlined was fairly presented by another instruction. We cannot extend this opinion with a detailed discussion of the instructions, which, from the nature of the case, were necessarily quite comprehensive. The parties by this verdict are placed as nearly as may be in the position they occupied before the transaction was entered into. We find no error in the record prejudicial to the defendants so as to require a reversal of the judgment.

The judgment of the district court is therefore

AFFIRMED.

ROSE, J., dissenting.

The facts constituting the fraud on which the relief granted is based are not pleaded. The judgment, though affirmed as a decree in equity, was rendered on the verdict of a jury in an action at law and is not supported by any evidence. The action was replevin. Under the writ plaintiff seized the property in a harness store and saddler's shop at Minden. The value of the stock was alleged to be \$3,800. Part of the goods in the store had been sold by defendants before the action was instituted. The jury rendered a verdict in favor of plaintiff and fixed the value of the property which had formerly been a part of the stock, but not taken under the writ, at \$1,400, and the damage for detention at one cent. The effect of the judgment rendered on this verdict in the action at law was to cancel an executed bill of sale and two separate contracts for the purchase of a half section of land, though grantee in one of the contracts is not a party to the action of replevin.

The import of the petition in replevin is that plaintiff owned the stock, and, through the fraud of defendants, was induced to enter into a contract to exchange it for 320 acres of encumbered land in Lincoln county; that defend-

ants procured possession of the stock of harness and the storeroom June 18, 1910, and that plaintiff rescinded the contract of sale August 3, 1910. Any fraud which can be inferred from the petition may be summarized thus: (1) Defendants falsely represented the value of the 320 acres of land to be \$25 an acre, whereas it was only worth \$4 an acre. (2) A fictitious agreement or fraudulent representation by defendants that C. K. Gittings would purchase the land from plaintiff and pay \$8,000 therefor. (3) By prearrangement among defendants and Gittings the latter promised to purchase the land from plaintiff with the intention of violating his contract, and attempted to carry out the fraudulent scheme, though it was agreed by all parties to both land deals that the sale of the stock of goods was contingent upon the performance by Gittings of his contract to buy and pay for the land. (4) The contract by Gittings to purchase the land for \$8,000 was materially altered without the consent of plaintiff. The trial court properly instructed the jury that there was no evidence to sustain either the first or the second charge of fraud. Nothing but the other charges is left for consideration. Plaintiff is a partnership composed of James C. York and his father, James H. York. The Boomer Implement Company, defendant, is a partnership composed of W. J. Boomer and three brothers. Before any of the contracts were executed, the senior York had viewed the land and Boomer had inspected the saddlery. After negotiations by means of letters, telephone communications and personal interviews, the two Yorks, Boomer and Gittings met at Hastings, June 17, 1910. Three contracts were there drawn and signed on that date. One was executed by W. J. Boomer on behalf of defendants and by J. C. York on behalf of plaintiff. It obligated defendants to convey the land to plaintiff, to execute a deed at once, and to deliver it August 1, 1910. It bound plaintiff to make a cash payment of \$3,800, to pay \$1,200 August 1, 1910, to assume on the same date two mortgages, one for \$1,400 and the other for \$600, and to execute a mortgage for \$1,000. Another

contract binding Gittings to purchase the land from plaintiff was signed by the vendee and by J. C. York. This contract obligated Gittings to make a cash payment of \$400, to pay \$4,600 August 1, 1910, and to assume three mortgages at that time, one for \$1,400, another for \$600, and the third for \$1,000. In addition to the two contracts described, a bill of sale transferring the saddlery to defendants was executed by plaintiff. The next morning Boomer appeared at the First National Bank of Minden and in presence of Gittings and the Yorks deposited in escrow his deed conveying the land to plaintiff and the two land contracts mentioned. Gittings deposited with the bank his cash payment of \$400, which has never been withdrawn. The Yorks testified that Boomer also deposited the bill of sale, but they concede that he withdrew it without protest from them before he left the bank, saying he was entitled to it. Since the trial court properly directed the jury that there was no evidence of the first and second charges of fraud, the verdict could only be sustained by proof supporting the third and fourth.

On the witness-stand the Yorks both said they stated to defendants and to Gittings, before the negotiations were concluded, that the sale of the stock of saddlery depended upon performance by Gittings of his contract to purchase the land, but they did not testify that defendants agreed to such terms, and there is no such proof in the record. The circumstances indicate the contrary. Though the parties undertook to reduce their agreements to writing, the writings do not show that the land contracts are dependent upon each other, nor do they state that the sale of the saddlery was contingent upon the sale of the land to plaintiff or upon the latter's sale to Gittings. The statements of the Yorks were merged in the contracts. It is neither alleged nor proved that there was fraud in drawing or in signing the contracts. Boomer kept the bill of sale without protest from plaintiff, and took charge of the store the next morning. Plaintiff turned the keys over to defendants within a few days, permitted a part of the stock

to be removed, and sanctioned sales in the regular course of business without making any demand for the proceeds or for an accounting. The record not only contains no evidence that defendants agreed to the oral terms upon which plaintiff relies, but those terms cannot properly be inferred from the circumstances proved. The reason Boomer left his deed at the bank instead of delivering it when executed is definitely stated in his testimony. Plaintiff owed him a balance on the purchase price of the land sold by him to it and he refused to deliver the deed before the debt was paid. Anxiety on the part of plaintiff to sell the saddlery was fully shown. For the purposes of a sale Stanley was plaintiff's agent under an agreement that he should receive \$25 for expenses. The introduction of Gittings to Boomer by York, as disclosed by the evidence, was an innocent circumstance fully explained. It is like others which occur every day in legitimate business transactions. It is only by attaching to innocent acts sinister aspects not shown by any evidence that even suspicions of fraud can be created: Such suspicions may arise from negotiations resulting in any honest agreement, and the effect of entertaining them in this case is to interfere with the right of contract, to make the court the guardian of the improvident, to destroy the integrity of written instruments, and to deprive parties to contracts of rights guaranteed by the state and the federal constitutions. The third assumed allegation of fraud is not proved.

The fourth imputation of fraud is likewise unproved. There is no evidence that defendants, or any of them, changed the Gittings contract. Gittings testified positively that he made the erasure before the contract was signed. If he was mistaken, a court of equity would reform the contract to express the agreement made and thus enforce it. That he was financially able to perform is shown by undisputed proof that he was worth \$75,000. Boomer was not a party to that contract. He had no motive for changing it. As to him the change was immaterial. If, contrary to the evidence, his dishonesty had been shown,

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his business acumen, as conclusively established, is proof against the charge that he changed the contract and thus defeated his own negotiations by a foolish and unnecessary act. Facts constituting fraud are neither shown by direct proof nor by proper inference.

BARNES, J., concurs in this dissent.

JOHN M. RISHER, APPELLANT, v. NELS C. MADSEN,
APPELLEE.

FILED JUNE 16, 1913. No. 17,106.

1. **Evidence: SECONDARY EVIDENCE.** A witness who testifies positively that she received a letter from the defendant in due course of mail, that she knows who signed the letter and it was signed by defendant, and that the letter has been lost, that she has made careful search and is not able to find it, should be allowed to testify to its contents as far as material to the issue being tried. It will not be presumed that she has not had opportunity to know defendant's signature or other facts positively testified to by her, in the absence of cross-examination as to such opportunities.
2. **Adverse Possession: REBUTTAL EVIDENCE.** In an action of ejectment, when the defense is adverse possession and the statute of limitations, it is competent to prove in rebuttal that the defendant after the alleged running of the statute of limitations, being asked by the plaintiff why he was using the land, stated that the land was unoccupied, and made no claim of right as against the plaintiff.
3. ———: **TOLLING THE STATUTE.** In such action an attempt on the part of the defendant to lease the land from the plaintiff during the alleged running of the statute of limitations will toll the statute.
4. **Ejectment: GENERAL DENIAL: EVIDENCE: SUBSEQUENTLY ACQUIRED TITLE.** Evidence that the defendant in ejectment has purchased an outstanding tax title based upon a sale for taxes while the action is pending cannot be received under a general denial. If such issue is tendered upon a supplemental answer the plaintiff will be allowed to join issue thereon.
5. **Adverse Possession: QUESTION FOR JURY.** Possession upon which to

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base a title under the statute of limitations must be adverse to all the world, including the plaintiff who holds the legal title. If the holder of the legal title is a nonresident and pays all taxes on the land regularly and has no actual notice that the land is claimed by any one adversely to his title, and a trespasser, without any color of title, cuts wild grass and otherwise uses unclosed lands and excludes other trespassers to enable him to do so, it presents a question for the jury to determine whether he has held such possession as is adverse to the rights of the true owner.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Reversed.*

Leavitt & Hotz and H. M. Buddha, for appellant.

James P. English and Will H. Thompson, contra.

SEDGWICK, J.

The plaintiff brought this action in ejectment in the district court for Douglas county to recover the possession of five lots in block 74, in Benson, an addition to the city of Omaha. The answer was a general denial. The trial resulted in a verdict and judgment for the defendant, and the plaintiff has appealed.

It appears from the evidence that in 1893 block 74 and various other adjoining blocks in that addition were wild, uncultivated lands. Several dairymen and others were in the habit of keeping their herds in that neighborhood and pasturing them where they could on unoccupied lands. Some tracts of land appear to have been rented by various stock owners, and others were used without any authority from the owners. One Hanson had a herd of cows, and had a lease of some lands adjoining or in the vicinity of block 74, and had erected a fence along one side of block 74, and had apparently been grazing his cattle on the land that is now in dispute. In 1893 this defendant and one Jacobson in partnership bought out the interest of Hanson in his dairy and apparently in his leases, including the fences which Hanson had erected adjacent to block 74. They be-

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gan at once to use all of block 74, cutting the grass, making hay in the summer, and pasturing the cows on the grass after the hay had been removed. The block was good hay ground, except about an acre which they plowed and put in millet. After about two years the defendant bought out Mr. Jacobson's interest in the business, and continued as before, including the use of block 74. From their first occupancy of this land in 1893 for a little more than 10 years they continually claimed the right to use this land. They excluded other dairymen and herders therefrom and prevented people from driving indiscriminately over it. Fannie B. Risher purchased this land in June, 1893, and received a warranty deed therefor, and in March, 1905, she, then being a member of the plaintiff's family, conveyed the land to this plaintiff. The plaintiff put in evidence conveyances apparently showing his chain of title direct from the government. His legal title so obtained is not controverted in the record. The plaintiff and his immediate grantor paid the taxes upon the land. They allowed the land to be sold for taxes in 1900, but afterwards, in 1902, redeemed it. After defendant excluded plaintiff from the land in 1905, the plaintiff paid no taxes; in 1908 the land appears to have been sold for taxes of 1906, and in January, 1910, the county treasurer executed a treasurer's tax deed conveying the land to one Francis I. Thomas, and thereupon Francis I. Thomas and Dexter Thomas executed a quitclaim deed of the lands in question to this defendant.

The defendant claims the land by adverse possession. He made no attempt to establish any other claim or right at the time of the commencement of this action. There is no doubt that he used the land during the 10 years that he claims to have used it, and there is no doubt that he excluded the public generally from the land. The real issue between the parties was whether he held this land adversely to the plaintiff. One witness testified positively that in 1893, about the time the defendant began using the land, the defendant told him that he had rented the

land and had a right to use it. The defendant positively denies this. Edwin Garvin, a real estate agent of Omaha, testified that he represented the owners of this property, and early in 1905, as agent of the plaintiff, he had a conversation with the defendant in which he asked the defendant what he was doing on the land, and what right he had there, and that the defendant answered: "Nobody was using it and he had been cutting grass; he didn't claim to own the land." Afterwards, the witness served a notice on the defendant for possession. The defendant then said that he had possession and was going to hold it. The defendant testified in regard to this conversation, and appears to intend to contradict the evidence of Mr. Garvin, although the defendant's testimony is not very explicit.

Mrs. Risher testified that in 1901 she received a letter from the defendant; that it came by mail in the usual way; that she had made diligent search for the letter and was unable to find it; that she knew by whom it was signed, and that the defendant's signature appeared on the letter; and that she was able to state the contents of the letter. This she was asked to do, but, upon objection, her evidence was excluded. This evidence was apparently excluded upon the ground that Mrs. Risher was not in position to know the signature of the defendant, but she testified positively that she did know his signature, and there was no attempt to cross-examine her as to her means of knowledge, and in the absence of such cross-examination we think the evidence should have been admitted.

If it is true that in 1901 the defendant attempted to lease the land from the plaintiff or his grantor without making any claim to hold it adversely against the plaintiff, or if it is true that when Mr. Garvin, the plaintiff's agent, first approached him in 1905 and asked him in regard to his claim the defendant made no claim to hold it adversely to the plaintiff's interest, he could not claim title by adverse possession against the plaintiff.

We think also the court erred in receiving in evidence

the treasurer's tax deed and the deed from Thomas to the defendant. This action was begun in 1906. This deed, therefore, and the sale upon which the tax deed was issued all occurred while this action was pending. In an action of ejectment the defendant under general denial can make any defense that he has, but it must be a defense to the plaintiff's right of possession as it existed at the time that the action was begun. If the defendant had obtained rights in the property, or had secured substantial equities after the action was begun, it seems probable that under our liberal code practice he might be allowed to present such subsequently acquired rights for adjudication by supplemental pleadings, but he ought not to be allowed to do so under a plea of general denial of the plaintiff's right of possession without supplemental pleadings. *Duggan v. McCullough*, 27 Colo. 43, 59 Pac. 743. If the defendant tendered such issue by supplemental pleadings, the plaintiff would of course be allowed to join issue thereon, and such issue, if equitable in its nature, would be determined by the court. The court by instructions attempted to withdraw from the jury all consideration of this tax purchase and deed as affecting the right of possession. If the tax deed had been brought into the case by proper pleading and proof, the trial court would be required to determine the legal questions arising as to its validity, and the right of possession thereunder. Its reception in the condition that the issues then were and its subsequent rejection tended to confuse, and perhaps to mislead, the jury.

The plaintiff and his grantor, who held the legal title to this land during the 10 years that the defendant is now claiming that he held it adversely, were residents of another state, and the evidence shows that they paid the taxes on the land in good faith and had no actual notice of any adverse claims of ownership whatever. Did the defendant hold this land adversely to their title and possession? Did he have such possession and use of the land as would in law afford the rightful owners constructive

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notice that he was holding it adversely to their right? He admits that he had no right to the land whatever when he commenced using it. He made no inquiry as to the true owners, but he says he claimed the land from the start. If this claim was merely as against other trespassers, and an attempt of himself and other cattlemen to apportion these unoccupied lands among themselves, and use in herding and appropriating the wild grass without any act or claim adverse to the owners of the title, this would not necessarily constitute such adverse possession against the true owners as would ripen into complete title. If the jury found from the evidence that within 10 years before the commencement of this action the defendant recognized the plaintiff's right by attempting to lease it from the plaintiff or his grantor, or that, when the plaintiff by his agent inquired of the defendant what right he claimed in the land, he failed to assert any right in the land itself as against the plaintiff, the verdict should have been for the plaintiff. There was no doubt under the evidence that the defendant's use of the land was adverse as to the other cattlemen who were using other tracts of land in that neighborhood in the same manner, and if this question had been presented to the jury they might have found that this was the extent of the defendant's claim of adverse possession. The real issue was not defined and plainly submitted to the jury in the instructions.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

LETTON, ROSE and HAMER, JJ., not sitting.

BUFFALO COUNTY, APPELLEE, v. JOEL HULL, APPELLANT.

FILED JUNE 16, 1913. No. 17,148.

OPINION on motion for rehearing of case reported in 93 Neb. 586. *Rehearing denied.*

SEDGWICK, J.

The brief upon the motion for rehearing points out two mistakes in the opinion. 93 Neb. 586.

1. The first one of them is that the opinion says that the bridge was built in 1874, and also says that the act of 1879 was in force when the bridge was built. The point in mind was that the statute of 1881 was treated by Judge MAXWELL in the opinion in *State v. Kearney County*, 12 Neb. 6, as controlling, although it was enacted a long time after the bridge was built; and the opinion in this case is all predicated on the statement therein: "The liability of adjoining counties for repairs of a bridge over a stream between them is fixed by statute, and it is within the power of the legislature to alter or amend the statute in that regard. The conditions and extent of the liability depend upon the statute in force when such repairs are made and the liability incurred." 93 Neb. 586. This was what Judge MAXWELL held in 12 Neb., the case upon which this defendant relied. The error in stating that the act of 1879 was in force in 1874 is quite immaterial to the merits of the case.

2. The second error is that it is stated that the repairs involved in this case were made in 1894. This is a typographical error for 1904. The proceedings were begun in 1904 and the repairs ordered, but it appears they were not actually made until 1905. This typographical error is immaterial to the merits of the case.

The motion for rehearing is

OVERRULED.

**W. D. STARBIRD, APPELLER, v. J. H. MCSHANE TIMBER
COMPANY ET AL., APPELLANTS.**

FILED JUNE 16, 1913. No. 17,152.

1. **Brokers: COMMISSIONS.** One who is employed by another to sell specified property at a stated price and for an agreed compensation for making such sale, but has no exclusive contract of agency, other persons with his knowledge being likewise authorized to make such sale with the same agreement as to compensation, cannot recover the stipulated commission upon sale being made by others so employed, although his own efforts may have contributed to the result.
2. ———: **ACTION FOR COMMISSION: PLEADING.** Neither the pleadings nor the evidence in this case will support a judgment for the value of the plaintiff's services in assisting to make a sale of the property.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. Reversed.

Isaac E. Congdon, for appellants. .

De Bord, Fradenburg & Van Orsdel, contra.

SEDGWICK, J.

During the year 1907 the J. H. McShane Timber Company, a corporation, owned property and a business in the Big Horn mountains in Wyoming, which had cost the company about \$400,000. The capital stock of the company was \$250,000, all of which was held by J. H. and F. J. McShane. In the beginning of the year the company was largely involved in debt and the business was unprofitable and very much embarrassed. It became apparent that the business could not be continued and that a sale of the entire property and business would soon become unavoidable. This plaintiff had been conducting a somewhat similar business in Idaho, and was contracting for one in the state of Washington. He heard incidentally that the McShanes were anxious to sell their property

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and business, and wrote them that he had heard that they desired to sell and suggested that he might be of assistance to them. Afterwards it was suggested to the McShanes by a former owner of the property that this plaintiff might be able to effect a sale. The McShanes requested the plaintiff to meet them at the property, and a verbal understanding was arrived at between them under which the plaintiff became very much interested in assisting the McShanes in placing and keeping the property and business in condition to sell and in finding a purchaser. There was at that time no definite contract between them as to compensation to the plaintiff for his services, but it seems to have been understood that the plaintiff was authorized to sell the property, and he was promised if he succeeded in making such sale that he would be amply paid therefor, "more money than he had ever had." With this indefinite understanding the plaintiff, who appears to be an active man and to have had some experience and a large acquaintance with parties who might be expected to become purchasers of such property, gave considerable time and attention to the undertaking of selling the property and in assisting the McShanes in so doing. In the meantime the condition of the business did not improve. Matters continually grew worse. The McShanes became desperately anxious to sell. The plaintiff demanded a definite agreement as to his authority in the matter, and in March, 1908, the timber company gave him a memorandum in which they agreed to sell the whole property to the plaintiff for the sum of \$260,000. The memorandum concluded with these words: "The intent of this instrument is an option of purchase, and is and shall remain in force until July 1, 1908." Afterwards the McShanes executed a writing whereby they gave the plaintiff "the right, privilege and option" up to January 1, 1909, of selling the entire capital stock of the company for a price therein stated, and agreed to pay him \$25,000 for making such sale. At the same time they executed a writing, which is called a supplemental instrument, in which they re-

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ferred to the last-named writing, and extended it to April 1, 1909, and included, not only the stock of the company, but all of its property rights also. Both of these writings bore the same date and appear to have been delivered together in September, 1908.

In November, 1908, the creditors became insistent, and the McShanes became unable to obtain further money or supplies so as to continue the operation of the plant. They were indebted to the First National Bank of Omaha in the sum of \$74,000, and to Paxton & Gallagher in about the sum of \$25,000 for supplies, and to the Bank of Commerce of Sheridan, Wyoming, in a large amount. When Paxton & Gallagher refused to furnish supplies, Mr. McShane appears to have stated to Mr. Pearce, their manager, the condition of the company's affairs, and informed Mr. Pearce that it was impossible for them to continue the business, and suggested that it would be better to go into bankruptcy or have a receiver appointed. Mr. Pearce suggested that it would be better to turn the property and assets over to trustees to hold and manage the same for the creditors, and upon this suggestion a contract was entered into appointing Mr. Pickens, of Paxton & Gallagher, Mr. Davis, the first vice-president of the First National Bank, and Mr. Perkins, president of the Bank of Commerce of Sheridan, as trustees, and all of the property was assigned to them in that capacity. The trustees took possession of the property in November, 1908, and continued the business. In January, 1909, the property was sold to McPherson & McLaughlin for \$182,850. While this sale was being consummated, this plaintiff served notice on all the parties interested that he claimed a commission of \$25,000 if the property was sold, and afterwards the plaintiff began this action in the district court for Douglas county against J. H. and F. J. McShane and the McShane Timber Company and the three trustees to recover the \$25,000 commission. Upon the trial, when the evidence was completed, the trustees moved for an instructed verdict in their favor. The McShanes

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and the McShane Timber Company moved for an instructed verdict in their favor. The plaintiff dismissed his action as to the trustees, and moved for an instructed verdict in his favor against the McShanes and the McShane Timber Company. The court thereupon dismissed the action as against the trustees and discharged the jury, and afterwards rendered a judgment in favor of the plaintiff against the McShanes and the McShane Timber Company for \$18,798, and the defendants have appealed.

The action was based upon the contract, authorizing the plaintiff to sell the property, to recover the \$25,000 agreed commission for doing so. There was no allegation of the value of the plaintiff's services. The plaintiff insists that there is sufficient evidence of the value of the services to support the judgment, and also insists that under the evidence the plaintiff was entitled to the full sum of \$25,000, and that the defendants cannot complain of the judgment for a less amount. With the contracts above stated between the plaintiff and McShane, the latter employed the plaintiff to assist in the management of the business and care of the property, and to put it in condition to sell. They paid him \$300 a month, and agreed that his salary should begin from the preceding January. They also paid all of his expenses incurred either in the care of the property or in endeavor to sell. The plaintiff insists that the salary was paid him because the employment would require him to employ a man to manage his business, and that plaintiff gained nothing by receiving this salary. But the plaintiff testified that in May, 1907, he was operating a lumber plant in Chance, Idaho, and "had gotten out all our timber and still had all of our property, and I was undertaking to get our money out of it, and was tied up in another contract I was figuring on." He closed this latter contract by purchasing a mill at Springdale, Washington. He says that his plant at Springdale was to "start up" April 1, 1909. He looked after his personal interests himself, and there is no evidence that he employed a man in his place or was put to

any expense in that regard. As we have already stated, his first contract of March 28, 1908, was merely an option to purchase the property for a fixed price of \$260,000, and was to remain in force until July 1, 1908. The contract for commission for selling the property upon which he sues, which was dated a few days later, fixed the value of the property at which he was authorized to sell at a somewhat less figure. This price was fixed upon careful inventories of cash values estimated by plaintiff himself, and was about \$250,000. He was not engaged in the business of a broker, and had no advantages for securing purchasers such as a clientage of a broker's agency might have supplied. McShane agreed to give Mr. McPherson the same commission if he would sell the property. He made the same agreement with several others. The plaintiff had no exclusive agency to sell the property. No doubt this employment with a salary was dependent upon the more important matter of selling the business. McPherson, who was also promised \$25,000 if he should make a sale of the property, appears to have been very active in the matter. He knew that the property was about to be sacrificed and was ready to take an interest in it himself, but did not want to undertake the purchase alone, and afterwards did actually purchase it from the trustees with Mr. McLaughlin. Mr. McLaughlin was engaged in similar business in another location, and when the property was offered to him for \$250,000 he expressed himself as unwilling to pay more than \$225,000, and afterwards reduced this from time to time, and finally made the definite offer of \$180,000 for the property. The contract with the trustees gave them full power to sell the property for such price and upon such terms as they found to be in the interest of the creditors. It was provided that the McShanes might make contracts for the sale of the property subject to the approval of the trustees. At a meeting in Omaha in January, 1909, with McPherson and McLaughlin, at which the trustees and others interested were present, including Mr. J. H. McShane, a contract of sale was made by the trus-

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tees to McPherson & McLaughlin. McShane had understood that these purchasers would pay at least \$200,000 for the property, and when they proposed to pay only \$180,000 he protested. The trustees finally offered to accept \$182,500, with a few dollars added as expenses, and McShane at once left them, declaring that that amount would not be sufficient to pay the indebtedness. In this he appears to have been right. The indebtedness largely exceeded the amount of the sale. This plaintiff was not present when the sale was made. It does not appear that the purchasers or the trustees, or any of them, knew that the plaintiff had any contract for a commission, nor that he was employed to make a sale. They seem to have understood that the plaintiff was employed at a salary, and supposed that that was the extent of his relation to the business. When the property was turned over to the trustees they contracted with the plaintiff to continue in their employment, so that he had notice of the assignment and of the duties and powers of the trustees. He knew that, while these defendants were still interested in the property and in bringing about as advantageous a sale as possible, no sale of the property could be made except by or through the trustees, and of course his power to act was limited accordingly. When it was found that the property could not be sold for the price for which the plaintiff had been authorized to sell it, and that it must be sold for some price, no new agreement was made authorizing him as agent to sell for a lower price, and yet these defendants continued to avail themselves of his efforts to secure a purchaser for the property.

We have attempted to state the facts sufficient to show in a general way the nature of the plaintiff's employment and the necessary construction of his contract. Neither the plaintiff nor any one of the other parties authorized by the McShanes to sell the property nor Mr. McShane himself can be said to have done so. How much the efforts of any one of them contributed to the result it is difficult to determine. The sale was consummated and closed by the

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trustees. They never employed nor authorized this plaintiff to sell the property. Under these circumstances, it seems clear that it cannot be said that the plaintiff has sold this property and so became entitled to the stipulated sum that was to be paid him if he made such sale. On the other hand, it was not the understanding of the parties that the salary paid to the plaintiff should necessarily be in full payment for all services rendered by him, if such services were of greater value than the amount of the salary. So far as we have observed from the examination of the abstract, evidence was offered by the plaintiff as to the value of his services, but was excluded upon objection. At all events, there is not sufficient evidence in the record to justify the judgment upon the ground of the value of the plaintiff's services. The plaintiff should be allowed to amend his petition, if so advised, and count upon a *quantum meruit* upon payment of costs accrued to the time of making such amendment.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

ROSE, FAWCETT and HAMER, JJ., not sitting.

SAMUEL M. JACKSON, APPELLANT, v. CHARLES F. ROHRBERG ET AL., APPELLEES.

FILED JUNE 16, 1913. No. 17,265.

Limitation of Actions: ACTION BY MORTGAGOR. The mortgagor's cause of action to quiet his title, recover possession, and redeem from the lien of the mortgage accrues when the mortgagee takes possession of the mortgaged property with color of title to the fee and claim of ownership, and the ten years' limitation of the statute will then begin to run.

'APPEAL from the district court for Pierce county:
ANSON A. WELCH, JUDGE. *Affirmed.*

Fred H. Free, McGraw & Wilke and C. S. Polk, for appellant.

Douglas Cones, Mapes & Hazen, W. W. Quivey and M. H. Leamy, contra.

SEDGWICK, J.

The plaintiff began this action in the district court for Pierce county to quiet his title, and recover possession of the real estate described, and to redeem the same from the lien of a mortgage. After some questions had been raised, the plaintiff filed an amended petition, and the defendants demurred thereto generally. The court sustained the demurrer, and, the plaintiff not pleading further, the action was dismissed, and the plaintiff has appealed, so that the only question presented is as to the sufficiency of the petition to entitle the plaintiff to the relief demanded.

The petition alleges that the plaintiff obtained title to the premises by deed on the 16th day of April, 1890. There is no allegation that he ever obtained possession, and the petition alleges that the defendants are in possession. The petition also alleges that in April, 1890, a mortgage company filed a petition in the district court for Pierce county to foreclose a mortgage upon the land, and that in May, 1890, a decree of foreclosure was entered in that action for the sum of \$10,704.76, and that a sale was had thereunder, and pursuant thereto the sheriff executed a deed and delivered it to the plaintiffs therein, who afterwards conveyed to these defendants.

From these allegations it appears that these defendants and their grantors, as mortgagees, took possession of the land in the spring of 1891, with color of title, and claiming the title against this plaintiff and all others. The plaintiff's cause of action accrued when the mortgagees entered into possession under their claim of title. *Clark v. Hannafeldt*, 79 Neb. 566. This action was not begun until much more than 10 years thereafter. The plaintiff's

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action was therefore barred by the statute of limitations, and the demurrer to his petition was rightly sustained.

The judgment of the district court is

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

**FORD & ISBELL LUMBER COMPANY, APPELLANT, v. H. F.
CADY LUMBER COMPANY, APPELLEE.**

FILED JUNE 16, 1913. No. 17,293.

1. **Pleading: ANSWER: JOINDER OF DEFENSES.** A defendant may plead in his answer as many defenses as he has, whether legal or equitable, or both. Such defenses must be consistent. They are consistent unless one of them cannot be proved without disproving the other.
2. ———: ———: ———. The petition alleged that "the defendant (a corporation) through J. F. Gresly & Co., brokers, ordered in writing of the plaintiff" certain property, describing it, and setting out the written contract in full, signed by G. & Co., and not purporting to be signed or authorized by defendant. The answer was in substance a general denial, with the allegation that the plaintiff did not ship the property "within a reasonable time after it alleged it received said order from" G. & Co. *Held*, That these defenses were not inconsistent, and did not amount to an admission that G. & Co. were authorized by defendant to make the contract for it.

**APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Affirmed.***

W. D. McHugh and W. H. Herdman, for appellant.

De Bord, Fradenburg & Van Orsdel, contra.

SEDGWICK, J.

This cause was determined in the district court for Douglas county upon a demurrer to the plaintiff's peti-

tion. The district court sustained the demurrer, and, plaintiff refusing to plead further, judgment was entered for defendant, and plaintiff has appealed.

The parties have discussed numerous points of practice in an interesting way, but it is necessary, in our view of the law, to discuss but one of the points presented. The action was begun in county court, and it was a term case under the statute. In such case the rules of pleading are the same in the county court as in the district court. The original petition alleged that "the defendant through J. F. Gresly & Company, brokers, ordered in writing of the plaintiff five cars of lumber, said order being in words and figures following:" Then follows an order for the shipment of the lumber by plaintiff to the defendant, the terms being sufficiently definite, signed, "J. F. Gresly & Co." It is then alleged that the defendant refused to receive the lumber, and plaintiff was damaged in the sum of \$292.12.

It seems to be conceded that this petition was insufficient because it fails to allege that Gresly & Company had authority to make such a contract for the defendant. The defendant answered by general demurrer, a general denial, and "that the alleged contract is within the statute of frauds and void." During the progress of the trial in county court the defendant amended the answer by adding the following: "Defendant shows that independent of, and without waiving, the foregoing defenses, plaintiff cannot recover, for said plaintiff did not ship said lumber within a reasonable time after it alleged it received said order from J. F. Gresly & Company, brokers, nor did this defendant have any knowledge that the said plaintiff or any one else claimed that defendant had ordered said cars of lumber on September 25th, 1908; that, had defendant known that any such claim existed, it would have canceled such alleged orders, and defendant shows that the said plaintiff did not ship said lumber within a reasonable time after September 25th, 1908, nor until after lumber had greatly deteriorated in market value, nor did the plaintiff exercise good faith in said matter." The defend-

ant afterwards, and before the cause was submitted, asked to withdraw this amendment, but the county court refused permission to do so.

Upon appeal to the district court, the plaintiff filed a petition in the exact words of the original petition in the county court. The defendant demurred to this petition, and the court sustained the demurrer. The plaintiff then amended its petition by adding the allegation that the defendant amended its answer in the county court and attaching to the petition, as an exhibit, the said amendment, which is above quoted in full. The defendant moved to strike out this amendment, on the ground that it was surplusage and redundant. The court sustained the motion and struck out the amendment. The plaintiff then filed a petition, being the same as its original petition. The defendant again demurred to the petition. The plaintiff moved the court to strike out the demurrer, which motion was overruled, and the demurrer was then sustained, and, the plaintiff electing not to plead further, the court entered judgment dismissing the plaintiff's case. Of course, the county court should have allowed the defendant to amend its answer on suitable terms.

The principal one of these fine points of practice raised by the contending counsel is as to the construction and effect of the amendment to the answer which was filed in the county court. It is contended by the plaintiff that the allegations of this amendment are inconsistent with the general denial in the answer and amount to an admission that the alleged contract was a valid contract between the parties.

In our code practice a defendant may plead as many defenses as he has, whether legal or equitable, or both. The plea of the statute of frauds does not seem to be strictly applicable. The contract was in writing; it was not the contract of this defendant, but the general denial raised this issue, so that the question is, whether the amendment made in the county court is inconsistent with a general denial. Defenses "are not inconsistent unless the

proof of one necessarily disproves the other." *Blodgett v. McMurtry*, 39 Neb. 210.

Would proof that plaintiff did not ship the lumber "within a reasonable time after it alleged it received said order from J. F. Gresly & Company" necessarily prove that Gresly & Company were duly authorized to make the contract for the defendant? An allegation "if Gresly & Company were authorized and the defendant is bound by the contract the plaintiff did not ship," etc., would be an admission of the binding force of the contract under the decision in *Nason v. Nason*, 79 Neb. 582, and other cases. It seems to us that the allegations of the amended answer in the county court in this case amount to this: "Gresly & Company had no authority to make the contract you have sued upon, and you virtually admitted it and failed to ship the lumber to us according to the terms of the contract which Gresly & Company made." Some of the early cases in this court go to a great extent in excluding defenses on the ground of inconsistency. We are not inclined to press further in that direction. "Defenses are inconsistent only when one, in fact, contradicts the other, and has nothing to do with a seeming and logical inconsistency, which arises merely from a denial and a plea in confession and avoidance. Such a plea may sometimes be properly made in connection with a denial, as it may be true, in fact, that one never assumed the obligation sued on, and was an infant, or a *feme covert*, at the time it was claimed to have been assumed." Bliss, Code Pleading (3d ed.) sec. 343. And so it is not inconsistent to allege that Gresly & Company were not authorized to make any contract for defendant, and that the plaintiff has not complied with the unauthorized contract which they assumed to make. The plaintiff should allege and prove that it had substantially complied with the contract on its part, including the shipment of the lumber within a reasonable time. And such allegation and proof could be negatived under a general denial. The amendment to plaintiff's petition in the district court, therefore, setting up the amendment

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that defendant had made to its answer in the county court, added nothing to the petition, and the order of the court striking it from the petition was not prejudicial to the plaintiff. The petition failed to state a cause of action with or without this amendment, and the court did not err in sustaining a demurrer thereto.

The judgment of the district court is

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

OLE C. SORENSON, APPELLEE, v. LINCOLN TRACTION COMPANY, APPELLANT.

FILED JUNE 16, 1913. No. 17,294.

1. **Carriers: EJECTION OF PASSENGER.** It is the duty of the conductor and employees of the company in charge of a street car to maintain order and protect the passengers from insult and annoying disturbances such as loud talking, swearing and singing of boisterous and improper songs in the car. If a passenger refuses to refrain from such conduct, the conductor may remove him from the car, and may use such reasonable force as is necessary for that purpose.
2. ———: ———: **PREJUDICIAL INSTRUCTIONS.** Instructions quoted in the opinion are *held* to be misleading and prejudicial under the issues and evidence in this case.

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Reversed.*

O. S. Allen and O. B. Clark, for appellant.

Wilmer B. Comstock, contra.

SENGWICK, J.

The plaintiff alleged in his petition that he was a passenger on one of the cars of the defendant company from

the city of Havelock to the city of Lincoln, and that the employees in charge of the car, "under guise and pretense of preserving order and without any provocation, assaulted plaintiff with a club and controller with which the car was operated." He demanded damages for the injuries so sustained. The defendant answered that the plaintiff was boisterous and offensive to the other passengers and that he was in a state of intoxication; "that, in the discharge of their duties to preserve order and protect passengers from annoyance, the servants of the defendant requested the plaintiff to desist, whereupon he became more offensive and committed an assault upon them; that in resisting the assault and in enforcing order the servants used only reasonable force and no more than was necessary." There was a verdict and judgment in favor of the plaintiff, and defendant has appealed.

It appears that the car was crowded with passengers; that the plaintiff was employed in the Havelock car shops; and that he and a considerable number of his fellow employees were standing together in the rear end of the car. The plaintiff testified in his own behalf, and also called five of his fellow employees in the car shop, all of whom testified that they did not consider the plaintiff intoxicated at the time. The plaintiff and some of his witnesses testified that he drank two glasses of beer before he took the car that evening. One of these witnesses testified that the plaintiff "was conducting himself as a gentleman and making no disturbance; that the conductor came, and, after some words, pulled a black jack out of his pocket and struck him; that he pulled the bell and the motorman came running in and also hit him with the controller. Plaintiff made no effort to strike either of them, but merely attempted to protect himself." These witnesses vary somewhat in their version of the circumstances and language used between the plaintiff and the men in charge of the car at the commencement of the disturbance. James Dalton, a machine apprentice, also testified for the plaintiff and in some respects corroborated these other wit-

nesses. One Doran, who was not on the car at the time, testified for the plaintiff that he saw him at supper time and he appeared to be sober; he saw him again at 10 o'clock that night and he was sober at that time.

The question for the jury to determine was whether the circumstances and the plaintiff's conduct at the time were such as to lead a reasonably prudent man, situated as the conductor was, to believe that it was necessary to do what he did in the interest of the passengers and to preserve the peace, and that he acted with reasonable prudence under the circumstances or whether the conductor unjustifiably assaulted the plaintiff. It was in the interest of the passengers on the car that any public disturbance should be prevented and that they should be protected from annoyance and insult, and, on the other hand, that the passengers should not be unnecessarily or unreasonably assaulted by the employees of the company. The passengers then would be presumed to be disinterested witnesses in the case.

Mrs. Allen was a passenger on the car and was accompanied by a young girl. She testified, among other things, that they "went up to the front end of the car. We concluded that was the best place after seeing the conditions in the car. We were obliged to go to the city. We keep student boarders, and there were some things we could not get at University Place. We intended to wait until the drunk cars were gone. The car went by that we supposed was the regular drunk, as it was known in 'Uni,' so we said, 'We will have to take this car, the next one will be too late to get into the stores.' The platform was full of men. I got my way through, but my daughter attempted to get on and the bell rang and she fell. * * * After we had gone a ways there was so much noise, talking, swearing and some singing, and all the time the car kept stopping for quite a ways. I wondered why it was. Finally I watched and there were some men around the stove, and I noticed one reach up and pull the bell. I spoke to my daughter and said, 'They are pulling the bell.'

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I kept seeing the motorman look back, and I thought there might be something wrong with the car. I looked over the car, and my daughter said, 'Let's get off—I did not want to go—let us get something, whatever we can, for dinner.' I said, 'No, we will be up here by the motorman, we can jump off if anything happens.' They were so noisy, we were afraid of something. I saw the conductor. I was so far in front I could not understand what he said, but I think he asked them to quit pulling the bell rope. And then I saw the conductor, I think he went to him two or three times out there, and said something to them, but it didn't make any difference. And one passenger that sat opposite me said, 'There will be a racket, a row, but we will see fair play.' Of course then I didn't know what they were doing with the conductor; they were surrounding him, but I saw the conductor go back. * * * Some of the passengers sat with their mouths open; some were so intoxicated, they could not sit up straight. There was a good deal of noise and profane language and singing. * * * I saw the plaintiff grappling with the conductor. The three of them had hold of him. I thought all three were after the conductor. That's the way it looked to me."

The young girl testified: "The seats were full, most of them with drunken men. Noticed that the car kept stopping all the while. Thought there was something wrong, glanced back. I did not see any one pulling the bell cord, but heard the bell ring a number of times. * * * They had been singing most of the time, singing songs that were not fit to be sung in a place of that kind. I glanced back and saw this man strike the conductor. Looked around again and saw that they were fighting. Motorman kept looking back to see what the trouble was. He took the crank of the street car that he had in his hand. I remember seeing him go by me, as I was standing leaning against the seat, just as he got to this man. * * * It was very noisy and there was profane language. Came from parties standing around the stove. I saw the man at the stove

strike the conductor. Conductor struck in protection of himself. Think the passenger struck the conductor with his fist. Saw nothing in conductor's hand." Several of the passengers testified in the case and their testimony was generally corroborative of that of these two ladies.

The conductor testified: "Plaintiff's conduct attracted my attention. He was talking with two companions, very loud, and swearing, and raising quite a disturbance. I went up to him and told him that the noise would have to be stopped, and the swearing. Said he hadn't done anything but what he would do again, and defied me to stop him, and swore. Stopped the car and asked him to get off. I took hold of his arm and he struck at me. After he struck at me I struck back at him. Motorman came in. I don't know whether he hit anybody or not; I could not see. There was quite a jam."

The court instructed the jury: "(7) The undisputed evidence in this case shows that the plaintiff was a passenger upon defendant's car. It was therefore the duty of the defendant to use a high degree of care and diligence to protect plaintiff from injury, and to convey plaintiff safely and properly from Havelock to his destination in the city of Lincoln. If the defendant entrusts this duty to its servants, the law holds it responsible for the manner in which those servants discharge such duty, and the defendant is responsible for any malicious or wanton acts of its motorman or conductor, or either of them, against or upon the plaintiff during the course of the discharge of their duty to the defendant, which relates to the plaintiff, and if its servants, instead of protecting the plaintiff, assaulted and beat him without just cause, as hereinafter explained, then the defendant has failed in its duty to the plaintiff and is answerable to him for whatever injury he has sustained by such assault.

"(8) On the other hand, if you find from the evidence that the plaintiff was boisterous, unseemly and offensive to the other passengers riding in the car, then defendant's conductor not only had the right, but it was his duty to

the other passengers, to require plaintiff to desist in his boisterous and offensive conduct, even to the extent of requiring plaintiff to leave the car in the event that he still persisted therein."

It would seem that under this evidence the jury must have been misled by these instructions. The instructions do not seem to be exactly adapted to the evidence. The jury is told that it was the duty of the defendant to use a high degree of care and diligence to protect plaintiff from injury and to convey him safely and properly from Havelock to his destination in the city of Lincoln. This would be true so far as the ordinary duty of the defendant to its passengers is concerned, but it does not appear to have in view the question as to whether the conduct of the plaintiff was such as to make it the duty of the conductor to remove him from the car. In the following instruction the jury are told that, if the conduct of this plaintiff was boisterous and offensive to other passengers, the conductor had the right and duty to require him to desist, "even to the extent of requiring plaintiff to leave the car in the event that he still persisted therein." This does not appear to recognize the right of the conductor to use such force as was reasonably necessary under such circumstances to remove the plaintiff from the car. He might require the plaintiff to leave the car, but there is no light given the jury as to the right or duty of the conductor in case the plaintiff refused to leave. The instruction is followed immediately by another to the effect that words of provocation alone will not justify an assault, "except in so far as the assault consisted in attempting to put the plaintiff off the car." This language does not seem to remedy the failure to explain to the jury the duty of the conductor under such circumstances. The jury is nowhere directly told under what circumstances it would be the duty of the conductor to remove the plaintiff from the car. The tenth instruction is as follows: "While one may resist any unlawful attempt to injure his person, he must not in resisting an assault in that regard exceed the bounds

of necessary defense and protection, for it is only permitted as a means to avert an impending evil, which might otherwise overwhelm the party, and not as a punishment or retaliation for the injurious attempt. The degree of force necessary to repel an assault will naturally depend upon and be proportioned to the violence of the assault, but with this limitation any degree is justifiable. Excessive violence, even if called into play in the first instance, in self-defense, must be answered for in damages."

It seems that by the instructions the case was submitted as a quarrel resulting in an assault, and the question is put to the jury whether the assault by the conductor and motorman was justifiable as being in self-defense, whereas the real issue was whether the conductor and motorman were in the line of duty in protecting the passengers against the misconduct of the plaintiff and his companions and in attempting to remove plaintiff from the car, and, if they were, whether they used more violence than appeared to be reasonably necessary under the circumstances. The jury might have believed under this evidence that the plaintiff and his companions were noisy and boisterous and disregarded the rights of the other passengers entirely, or so much so that it became the duty of the conductor to take some action to preserve decent order, and they might have supposed, under these instructions, that the conductor was not justified in using force to eject the plaintiff from the car. From the condition of the evidence and the instructions, it seems clear that the jury must have been misled in regard to the real issue that they were required to pass upon.

The judgment of the district court is reversed and the cause remanded.

REVERSED.

ROSE, J., dissents.

FAWOETT, J., not sitting.

IN RE ESTATE OF JEANETTE VAN ORSDOL.

MINNIE INGERSOL, APPELLANT, v. ELIZABETH VINTON,
APPELLEE.

FILED JUNE 16, 1913. No. 17,299.

1. Descent and Distribution. The first four subdivisions of section 2, ch. 23, Comp. St. 1911, are limited and modified by the fifth and sixth subdivisions of the section.
2. ———. O. died, leaving a child by a former wife, also leaving his widow and their child, J. Afterwards J. died under age, and not having been married. *Held*, That the estate which J. took from her father descended to her sister.

APPEAL from the district court for Jefferson county:
LEANDER M. PEMBERTON, JUDGE. *Reversed*.

Hartigan & Wunder, for appellant.

Heasty, Barnes & Rain, contra.

SEDGWICK, J.

W. S. Van Orsdol died in March, 1909, and left surviving him his widow and their infant child, Jeanette Van Orsdol, and his daughter by a former marriage, this plaintiff, now Minnie Ingersol. Soon afterwards Jeanette Van Orsdol died in infancy, and a few days later the widow also died. The defendant, Elizabeth Vinton, as the surviving heir of Mrs. Van Orsdol, claims the share of Mr. Van Orsdol's estate which was inherited by the infant, Jeanette. The plaintiff, Minnie Ingersol, claims the share of the estate inherited by Jeanette, as her sister and the sole surviving child of their father, from whom Jeanette inherited the property. The district court held that the widow, Jeanette's mother, inherited her interest in the property, and the sister, Minnie Ingersol, has appealed.

Some other matters were presented by the record, but the only question discussed in the briefs is whether the

mother of Jeanette or her half-sister, the surviving child of her father, inherited her interest in the estate.

The statute governing is section 2, ch. 23, Comp. St. 1911, which is as follows: "When any person leaving no husband nor wife surviving, shall die, seized of any real estate, or any right thereto, or entitled to any interest therein, in fee simple, or for the life of another, not having lawfully devised the same, it shall descend, subject to his debts, in the manner following: *First.* In equal share to his children, and to the lawful issue of any deceased child by the right of representation; and if there be no child of the deceased living at his death, the estate shall descend to all his other lineal descendants; and if all the said descendants are in the same degree of kindred to the deceased, they shall have the estate equally; otherwise they shall take according to the right of representation. *Second.* If the deceased shall leave no issue, the estate shall descend to the father and mother of the deceased or to the survivor of them. *Third.* If the deceased shall leave no issue, nor father nor mother, the estate shall descend in equal shares to his brothers and sisters, and to the children of any deceased brother or sister, by the right of representation. *Fourth.* If the deceased shall leave no issue, nor father nor mother nor brother nor sister, the estate shall descend to his next of kin in equal degree, excepting that where there are two or more collateral kindred in equal degree but claiming through different ancestors, those who claim through the nearest ancestor shall be preferred to those claiming through an ancestor more remote: Provided, however, *Fifth.* If any person shall die leaving several children, or leaving one child and the issue of one or more other children, and any such surviving child shall die under age and not having been married, all the estate that came to the deceased child by inheritance from such deceased parent, shall descend, in equal shares, to the other children of the same parent, and to the issue of any such children who shall have died, by the right of representation. *Sixth.* If, at the death of such

child who shall die under age and not having been married, all the other children of said parent shall also be dead, and any of them shall have left issue, the estate that came to the said child by inheritance from his or her said parent, shall descend to all the issue of the other children of the same parent; and if all the said issue are in the same degree of kindred to said child, they shall take the estate equally; otherwise they shall take according to the right of representation. *Seventh.* If the deceased shall leave no kindred nor husband nor wife, the estate shall escheat to the state of Nebraska."

The solution of this question depends upon the meaning and effect of the fifth and sixth subdivisions of the section. They were first enacted by the territorial legislature of 1855 and 1856. 1 Complete Session Laws, p. 263. These two subdivisions have been retained without change in all of the subsequent amendments of the laws of descent of property. Section 176, ch. 14, Rev. St. 1866, after making allowances for the temporary support of the widow and minor children, provided that in the distribution of the residue of the personal property the widow should receive the same share as the child of the intestate. By the enactment of our present statute in 1907 (laws 1907, ch. 49; Comp. St. 1911, ch. 23, sec. 176) it is provided that the residue of the personal estate shall be distributed the same as real estate. So that before the act of 1907 the widow inherited personal property as one of the children, but by that act, when the husband or wife died, the survivor has an interest in the property of the deceased by virtue of the marriage relation. By the present act the share of the property of the intestate which is taken by the surviving husband or wife is definitely fixed. By the first subdivision of section 1, ch. 23, Comp. St. 1911, if the surviving husband or wife is not the parent of all the children of the decedent, he or she takes one-fourth part of the intestate's estate, but by the second and third subdivisions, if the survivor is the parent of all the children of the decedent, and there be two or more children,

or one child and the issue of one or more deceased children, the survivor takes one-third, but if there is only one child or the issue of a deceased child, one-half, and the survivor, if the parent of all of the children of the decedent, also takes one-half if there is no child surviving nor the issue of any deceased child. Under these provisions the surviving spouse is given absolutely one-fourth of the estate when not the parent of all of the children of the decedent, and that part of the estate of the decedent that may be diverted from the line of his or her descendants is limited to one-fourth, and this perhaps would furnish a reason for providing that if a child of the decedent, who has inherited a part of his or her estate, dies under age and unmarried, its share shall go to the other children of the decedent.

The seventh subdivision of section 2, above quoted, provides for escheat to the state when there is no one to inherit. The first four subdivisions provide generally for all cases where there is no surviving husband or wife. These four subdivisions are followed by "Provided, however," and are all limited, modified and explained by the proviso contained in the next two subdivisions, which complete the subject of the distribution of intestate estates when there is any one to inherit them. These two subdivisions are connected by the words "such child" in the sixth, and together compose one provision limiting all that part of the section which they follow and of which they are a part. The second subdivision, "If the deceased shall leave no issue, the estate shall descend to the father and mother of the deceased or to the survivor of them," is limited by the proviso, and is only operative when the conditions specified in the proviso do not exist.

This construction of the statute is necessary for another reason. If the fifth and sixth subdivisions of the section had been enacted independently, and not as a proviso, they would be special provisions applying to special circumstances not provided for or mentioned in the general provision for the descent and distribution of property. Gen-

eral provisions that might control in special circumstances and conditions must give way when there are special provisions for those particular circumstances and conditions. The rule of this proviso is very general, and its origin and reason are apparent. The theory is that property should stay on the side of the house from whence it came; it should go to one's descendants, if he has any. If the child reaches maturity it can protect the brothers and sisters in their inheritance. When all of the children of the decedent are also children and heirs of the surviving spouse, and one of the children dies under age and unmarried, if its surviving parent could inherit its share, it would go to all of the children of the decedent at the death of such surviving parent. In such case the proviso is apparently not necessary, and perhaps would be more logical if its application were limited to cases where the decedent left a child or children, or their issue, not the child or children of the surviving spouse. If some of the children of the decedent are not children of the surviving spouse, they would take no part in such share at the death of the surviving spouse. Therefore, upon the death of such child of the decedent, the property which it inherited from the decedent goes directly to all of the other children of the decedent.

The statute places the share that this infant inherited where it would have gone if she had died before, instead of shortly after, her father. This purpose of the statute is stated by the supreme court of Massachusetts, as follows: "The whole purpose is the descent of intestate estate; and we think the effect is that, where upon the descent of an estate to children, one of them shall happen to die in infancy, that is, at any time before arriving at the age at which, by law, he has the power of disposing of his estate, and before he has by marriage contracted obligations and established new connections which change his relative situation to others, his share of the inheritance, that is, his portion of the intestate estate, for the descent of which this statute is now providing, shall go

just in the same manner as if such child had died in the lifetime of the ancestor, or, in other words, to those who would have taken the same share if such child had not existed. It directs that it shall go to the other children of the parent from whom it came, which it would have done, had the child so dying not been in existence at the time of the decease of such parent. It is rather giving a new destination to that portion of the parent's estate, which has in some measure failed to accomplish the design of the legislature by the premature death of such child, than to provide a new and distinct rule of distribution for such child's own estate." *Nash v. Cutler*, 16 Pick. (Mass.) 491, 499. Their statute (Rev. St. Mass., ch. 61, sec. 1), like ours, contained the provision, among others, that if the decedent "have no issue nor father, the same shall descend in equal shares to the intestate's mother, if any, and to his brothers and sisters, and the children of any deceased brother or sister by right of representation," and the general provisions for the descent of intestate property were followed by a proviso, as in our statute, and the court said that the proviso was "an exception from the generality of the antecedent rule." The supreme court of Michigan follows this decision and quotes from it with approval. *Burke v. Burke*, 34 Mich. 451. Many courts have so construed statutes substantially the same as our own.

In *Estate of De Castro v. Barry*, 18 Cal. 97, the statute being entirely equivalent to ours, the court said: "The clause in question (our fifth subdivision) provides for a specific and peculiar state of facts; therefore, there is no contradiction between it and the general provisions going before, for these last provide the usual rule, while the latter clause provides the unusual rule, or the rule governing the particular case recited. This is not a contradiction, but only an exception. * * * The meaning being clear, probably it is not very important to inquire into the considerations which moved the legislature to make a different disposition of the property characterized in the seventh clause, and property otherwise coming to

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the intestate child. Possibly, the reason was that the legislature considered the husband sufficiently provided for in being allowed an entire third part of the estate of the deceased wife, irrespective of the number of children over one; and that he should not have his portion increased by the circumstance of the death of one of the heirs. The act gave him a defined proportion of the whole estate left at the death of the spouse, leaving the residue for the children; and as this proportion was liberal, and was not diminished by the number of the children, it might well have been considered not unjust to him that that proportion should not be increased by the death of any one or more of them." Our statute, as we have already seen, suggests the same reasons.

In *Estate of Donahue*, 36 Cal. 329, the former holding of the court is not questioned, but it was held that if the estate came to the deceased child by devise the statute did not apply. See, also, *Sheffield v. Lovering*, 12 Mass. *489; *Goodrich v. Adams*, 138 Mass. 552; *Runey v. Edmands*, 15 Mass. *291.

The defendant relies upon *Rice v. Saxon*, 28 Neb. 380, *Gwyer v. Hall*, 34 Neb. 589, and *Shellenberger v. Ransom*, 31 Neb. 61, rehearing, 41 Neb. 631. In *Rice v. Saxon*, *supra*, the husband died leaving two children and a widow, who was the parent of one of the children, a son, the other being a child of a former marriage. The son died unmarried and without issue, and it was held that the estate which he inherited from his father "descended in equal proportions to the mother and sister of said son."

In *Gwyer v. Hall*, *supra*, when Mr. Hall died, he left a widow, and afterwards a son was born. Mr. Hall left no other children or issue of any deceased child. Therefore the statute that we are now construing had no application, and the mother inherited from her son under the fourth subdivision of section 30 of the decedent law, as it existed under the Revised Statutes of 1866.

In *Shellenberger v. Ransom*, *supra*, when Mrs. Shellenberger died she left two children, who were also the chil-

dren of Mr. Shellenberger. She left no other children, and when one of those children died it was held that, under the ordinary operation of the statute, Mr. Shellenberger would inherit the estate which his child had inherited from its mother; but this decision was expressly overruled in *Veeder v. McKinley-Lanning Loan & Trust Co.*, 61 Neb. 912, in which it was said: "It also appears from the record that at the time of the death of the owner of the land in controversy she left surviving her two children, the appellant and one other, who soon thereafter and in infancy died. Under the provisions of the sixth subdivision of section 30, chapter 23, Compiled Statutes, entitled 'Decedents,' the surviving brother succeeded to the inheritance of all the real estate of the deceased parent, subject only to the life estate of the father as tenant by curtesy. *Burke v. Burke*, 34 Mich. 451; *Runey v. Edmands*, 15 Mass. *291; *Estate of De Castro v. Barry*, 18 Cal. 97. We are aware that the view thus expressed is not in harmony with the opinion in *Shellenberger v. Ransom*, 31 Neb. 61, and same case on rehearing, 41 Neb. 631. In that case, however, this provision of the statute was entirely overlooked; and, in the face of the plain statutory enactment, the case can no longer be considered authority." The case of *Rice v. Saxon*, *supra*, was decided under section 30, ch. 23, Comp. St. 1887, which was substantially changed by the act of 1907. It was substantially the same as the decedent law of the Revised Statutes of 1866. At the time it was first enacted the surviving spouse took only a life estate in the property of the decedent. Afterwards the rights of the wife were enlarged and she was allowed to take as a child of her deceased husband. The provision of that section of the Compiled Statutes of 1887, above cited, in that regard also "provided that if she shall have a mother also she shall take an equal share with the brothers and sisters." This language may have led to the supposition that she must be regarded as a child of the decedent and inherit accordingly. There is no discussion of the question in the opinion, and we are left in the dark

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as to the reasoning of the court. The subdivision of our statute which controls in case the decedent leaves children and one of such children dies in infancy and unmarried was not construed, and apparently not considered, and that case must be distinguished from the case at bar or regarded as overruled by the opinion in *Veeder v. McKinley-Lanning Loan & Trust Co.*, *supra*, which expressly overrules *Shellenberger v. Ransom*, *supra*.

The infant, Jeanette, having died "under age and not having been married," all the estate that came to her by inheritance from her father goes to this plaintiff, his surviving child.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

JOHN MOLER, APPELLEE, v. HELEN M. CASTETTER ET AL.,
APPELLANTS.

FILED JUNE 16, 1913. No. 17,300.

Adverse Possession: EVIDENCE. In an action to quiet title, if it appears that plaintiff has had possession of the land for much more than 10 years under a purchase for full value and claim of title, and that he and his grantors have regularly paid all taxes that have ever been assessed against the land, one witness testifying that plaintiff has had exclusive, adverse occupancy for many years, without specifying the number of years, and there is no cross-examination nor evidence that any one else has ever had or claimed any possession, a finding that plaintiff has title by adverse possession will not be reversed solely on the contention that no witness has testified that plaintiff's possession was exclusive and adverse during the whole time that he so held the land.

APPEAL from the district court for Holt county: JAMES J. HARRINGTON, JUDGE. *Affirmed.*

L. C. Chapman, for appellants.

J. A. Donohoe, *contra*.

SEDGWICK, J.

The plaintiff began this action in the district court for Holt county to quiet his title to certain lands in that county. The defendants answered claiming title to the land. The court entered a decree for the plaintiff, and the defendants have appealed.

The court found that the plaintiff had been in exclusive and adverse possession of the land for more than 10 years, and we think the finding is supported by the evidence. It appears that the land was wild land, and the plaintiff and his grantors have paid all taxes on the land that have ever been assessed thereon, and otherwise have had such possession as goes with their title papers, and for many years, if not the full term of 10 years before the action was begun, have been actually using the land to the exclusion of all persons whatsoever. The defendants offered no evidence as to the condition, possession and occupancy of the land, and the evidence in that regard is very meager as shown by the abstract and record.

It is very clear from the record that all of the equities are in favor of the plaintiff, and the judgment of the district court is therefore

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

FRANCES M. FARRINGTON, APPELLEE, v. F. E. FLEMING
COMMISSION COMPANY ET AL., APPELLEES; MERCHANTS
BANK OF ST. JOSEPH, APPELLANT.

FILED JUNE 16, 1913. No. 17,304.

1. **Garnishment: ANSWER: RIGHTS OF THIRD PARTY.** When a garnishee answers that he has money in his hands belonging to the judgment debtor, it is proper to allow one who claims the money, and is not a party to the proceedings, to appear and contest the right of the plaintiff to apply the money on his claim.
2. —: **APPLICATION OF FUND.** The effect of service upon the garnishee is to impound the funds in his hands. It is the duty of the garnishee to pay the money in his hands to the party having the better right as determined by the court. Only the interest of the attachment debtor can be applied upon the plaintiff's claim.
3. —: **BANK DEPOSIT: OUTSTANDING CHECK.** Before the enactment of section 188 of the negotiable instrument act (laws 1905, ch. 83) this court held that the holder of a check might maintain an action thereon against the bank on which it was drawn if the maker of the check had a general deposit in the bank subject to the check, when it was presented to the bank. *Fonner v. Smith*, 31 Neb. 107. This was upon the ground that as between the maker and holder the check transferred the deposit *pro tanto*. Without determining in this case the effect of that section on the rights of the bank, it is held that, when the holder in good faith has paid the maker in full for the check, the deposit is not subject to garnishment at the suit of another creditor of the maker.

APPEAL from the district court for Richardson county:
LEANDER M. PEMBERTON, JUDGE. *Reversed with directions.*

Waggener & Challis and Edwin Falloon, for appellant.

Reavis & Reavis, contra.

SEDGWICK, J.

The plaintiff began this action in the county court of Richardson county against the defendant, the F. E. Flem-

ing Commission Company, to recover money claimed to be due from that company, and procured the Richardson County Bank, doing business at Falls City, Nebraska, to be summoned as garnishee; the commission company at that time having a deposit account in that bank. Afterwards the Merchants Bank of St. Joseph, Missouri, intervened and claimed \$1,200 of the deposit. The commission company was a corporation doing business at St. Joseph, Missouri, and drew a check for \$1,200 upon its account in the Richardson County Bank in favor of the Merchants Bank of St. Joseph, and received the money thereon from that bank. There were several transactions between the commission company and the St. Joseph bank, but as no question is made in this case upon those transactions we state simply the legal effect thereof. The garnishment above stated was not issued and served upon the Richardson County Bank until after the commission company had given the check to the St. Joseph bank and received the money thereon. It will be seen that the controversy here is between the plaintiff and the St. Joseph bank. It appears from the answer of the garnishee that, when it was served with process, it held in the deposit account of the commission company the sum of \$1,237.56. The district court entered a judgment in favor of the plaintiff and against the commission company for the amount of the plaintiff's claim, and ordered the Richardson County Bank, as garnishee, to apply the deposit in payment of the judgment. The St. Joseph bank has appealed.

The intervener insists that the check of the commission company, which was paid by the intervener, creates an equity in the deposit in his favor as against the commission company, so that that deposit was not liable to attachment in the suit of a third party against the commission company. The plaintiff contends (1) that section 188 of the negotiable instrument act (laws 1905, ch. 83) applies, and that under that section the holder of a check has no equitable right in the deposit on which the check

is drawn; (2) that the St. Joseph bank "has no standing in court, either to have its claim heard, or to appeal from a determination of its claim adverse to its contention." The contention is that the matter in litigation was the disputed claim of the plaintiff against the commission company, and that as the St. Joseph bank was not interested in that claim it could not intervene under section 1047, Ann. St. 1911 (code, sec. 50a). But the matter in litigation was not only the claim of the plaintiff against the commission company, but also the deposit in the bank, and if the St. Joseph bank was interested in, and entitled to, that deposit, it would be entitled to protect that interest. We think the court did not err in allowing the St. Joseph bank to appear and resist the application of the deposit to the payment of the plaintiff's claim against the commission company.

Section 188 of the negotiable instrument act is as follows: "A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check." Before the enactment of that section this court held that the holder of a check might maintain an action thereon against the bank upon which it was drawn, if the maker of the check had a general deposit in the bank subject to check at the time the check was presented to the bank. *Fonner v. Smith*, 31 Neb. 107. The courts of some of the states held the same doctrine, but the supreme court of the United States and the courts of other states held that, under such circumstances, the holder of the check could not maintain an action against the bank, and that his right of action was against the maker of the check alone. *Bank of the Republic v. Millard*, 10 Wall. (U. S.) 152. This holding of the supreme court of the United States was expressly put upon the ground that the relation of depositor and banker is that of debtor and creditor. The moment the deposit is made it becomes part of the property of the bank, under a contract to repay the amount to

the depositor or to his order, at such time and in such amount as he may direct. The funds are no longer the funds of the depositor, but of the bank, and the depositor is the creditor for the principal sum. He has a right to draw for them in such sums as he may see fit. The obligation of the banker to the depositor is perfect. The latter may maintain an action for the whole deposit; he may countermand any and all the checks he has given; if he has funds when the check is presented, he may maintain an action on the case for a refusal by the banker to pay his check. The effect would be that a right of action for the same money in the hands of a third party existed in two persons upon one promise at the same time. The conflict in the two lines of cases was as to the position of the bank with reference to the fund, and not as to the equitable rights in the deposit of the maker and holder of the check, respectively. It appears to us that the holding of the supreme court of the United States and of those courts that followed that decision was more applicable to the common law practice and proceedings, and the reasoning of Mr. Justice MAXWELL in *Fonner v. Smith*, *supra*, was more applicable to the practice and proceedings under the code. Under the code practice it seems more natural to allow the action to be brought by the holder of the check as the real party in interest than to limit the liability of the bank to the old common law "action on the case" by one who would appear in equity to have transferred his interest in the deposit to another. If the effect of the negotiable instrument act is to adopt the rule that no action against the deposit bank can be maintained upon the check by the holder "unless and until it accepts or certifies the check," which it is not necessary now to decide, still that section is not applicable to the facts in this case. This plaintiff is not claiming under the negotiable instrument act. The effect of service upon the garnishee is to impound the funds in the hands of the garnishee. The bank holding the deposit is not directly interested in this litigation. Its duty as garnishee is to pay the money to

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the party having the better right to it, as determined by the court. The commission company had money on general deposit in the garnishee bank, and procured that money from the St. Joseph bank by drawing its check against that deposit in favor of the St. Joseph bank. The St. Joseph bank clearly has a better right to the deposit than the commission company has, and this plaintiff by garnishment could obtain no better right than her debtor had.

The order of the district court applying the deposit on the plaintiff's judgment is reversed, and the cause remanded, with instructions to enter a judgment for intervenor bank against the commission company for \$1,200, with protest fees and interest from the date of the check, and order the garnishee to pay the money in its hands into court to be applied on said judgment; all costs to be taxed against the plaintiff.

REVERSED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

DAWSON COUNTY, APPELLANT, v. PHELPS COUNTY,
APPELLEE.

FILED JUNE 16, 1916. No. 16,861.

1. **Counties: REPAIR OF BRIDGES.** Section 87, ch. 78, Comp. St. 1909, requires a county to contribute toward the repair of a bridge across the Platte river which extends into such county, although it is located mainly within the adjoining county.
2. ———: ———: "STREAM." The word "stream," as used in said section, is used in a general sense, and applies to rivers and smaller courses of running water. *Dodge County v. Saunders County*, on rehearing, 70 Neb. 451.

APPEAL from the district court for Phelps county:
HARRY S. DUNGAN, JUDGE. *Reversed.*

T. M. Hewitt and E. A. Cook, for appellant.

Frank A. Anderson, contra.

HAMER, J.

This action was brought by Dawson county against the county of Phelps to recover for repairs made to a bridge across the Platte river at a point south of the village of Overton, where the river divides the two counties. In the trial of the case, after the evidence had been submitted by the parties, the plaintiff county and the defendant county each submitted a motion for an instructed verdict. The court thereupon instructed the jury to return a verdict for the defendant county.

One of the contentions of the defendant county was that the village of Overton, in the plaintiff county, was near the bridge, while in the defendant county there was no town nearer than ten or twelve miles. From this it would seem that the supervisors of the defendant county took the view that, because the bridge was a convenience to the residents of the defendant county to enable them to trade in the plaintiff county, and because the plaintiff county by reason thereof secured a portion of defendant county's trade, defendant county should be relieved of its share in the maintenance of the bridge. While bridges across a river may be built with a view to the convenience of the people, and their construction may enable the people of one county to receive more trade than another, it is doubtful if such fact can be successfully urged as a reason why the law imposing upon two counties the joint obligation of keeping up a bridge should be abrogated. The plaintiff has appealed from a judgment in favor of defendant. The bridge as originally constructed was a toll bridge, and in 1890 was surrendered by the bridge company which constructed it to Dawson county, and was accepted by the same, and that county declared the bridge to be a free bridge.

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In the summer of 1908 the plaintiff county gave notice to the defendant county of needed repairs, and requested the defendant county to enter into a contract for the repair of the bridge. No action was taken by defendant, and plaintiff entered into a contract, as provided by the statute, and paid the contractor for the repairs which he had made, and filed its claim with the defendant county for one-half the cost thereof. The repairs made were of a substantial character and were quite extensive. It is shown by the evidence that the bridge was unsafe at the time the contract for the repairs was made; that holes had broken through the floor because the boards were worn; and that it was necessary to put the bridge in a good state of repair for public travel. It was also shown that the bridge was part of the public road, and that there was a highway in each county extending to the bridge. The bridge is in a populous part of the state, and because it is a part of the public road is much used. The expense incurred seems to have amounted to \$5,322.90, and it is claimed by the plaintiff that Phelps county should pay one-half of the same. There seems to be no issue raised as to the sufficiency of the notice served upon the defendant county to contribute to the repair of the bridge. There have been many bridge contests in this state not wholly dissimilar to the one under consideration.

The claim was rejected by the county on July 13, and notice of the action of the board was mailed to the county clerk of Dawson county July 14, and was received by him July 15. Notice of appeal was given the county clerk of Phelps county, and an appeal bond given and approved July 24. It is contended by appellee that an appeal was not taken in time, and that the court was therefore without jurisdiction, and that whether the appellant is right or wrong on the merits of the case is immaterial, because the appeal was not taken in time. An examination of the statute covering appeals for disallowed claims against counties does not disclose that any time is now provided by the statute when the notice of appeal must be served

and bond executed. This change of the law occurred in an act of the legislature of 1907. Prior to that time it was necessary, after serving notice upon the county clerk, to file an appeal bond within 20 days after the decision of the county board. As the statute stood at the time of the appeal in this case, no time was fixed within which notice of the appeal must be given and an appeal bond filed. It must then be taken that a party appealing would have at least a reasonable time within which to serve his notice and perfect his appeal, and the time consumed in this case does not seem to be an unreasonable time.

Was the court right in directing a verdict for the defendant? The statute fixes the north boundary of Phelps county and that part of the south boundary of Dawson county (which lies north of Phelps county) "as the middle of the south channel of the Platte river." It is urged by appellee that the "south channel" of the Platte river at the point where it is crossed by the bridge in question is a very narrow channel, being bounded by the south bank of the Platte river on the south, and an island in the Platte river on the north, which said island lies wholly within said Dawson county; and it is contended that, inasmuch as it was not shown that any part of the repairs made on the bridge were made upon the part thereof between the south bank and this island, the verdict is right.

The statute governing the construction of bridges over streams between counties (Comp. St. 1909, ch. 78, secs. 87-89) provides:

"Section 87. Bridges over streams which divide counties, and bridges over streams on roads on county lines, shall be built and repaired at the equal expense of such counties; provided, that for the building and maintaining of bridges over streams near county lines, in which both are equally interested, the expense of building and maintaining any such bridges shall be borne equally by both counties.

"Section 88. For the purpose of building or keeping in repair such bridge or bridges, it shall be lawful for the

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county boards of such adjoining counties to enter into joint contracts; and such contracts may be enforced, in law or equity, against them jointly, the same as if entered into by individuals, and they may be proceeded against, jointly, by any parties interested in such bridge or bridges, for any neglect of duty in reference to such bridge or bridges, or for any damages growing out of such neglect; provided, that if either of such counties shall refuse to enter into contracts to carry out the provisions of this section, for the repair of any such bridge, it shall be lawful for the other of said counties to enter into such contract for all needful repairs, and recover by suit from the county so in default such proportion of the costs of making such repairs as it ought to pay, not exceeding one-half of the full amount so expended."

The words "streams which divide counties" have received consideration from this and other courts, and it seems to have been uniformly held that, in arriving at the meaning of the words, not only their literal meaning is to be considered, but the purpose of the statute. Literally the Platte river does not divide Dawson and Phelps counties, because the dividing line is made the middle of the south channel, and part of the river therefore lies in Dawson county and part in Phelps county, and the actual boundary is an imaginary line in the river; but in the statute under consideration, which deals with the construction of bridges across "streams which divide counties," the legislature employed the words in their ordinary sense and for rivers, not to an imaginary line in the stream, but to the whole stream, consisting of its bed, the water flowing therein, and the banks or shores thereof confining the water, on one side of which stream lies one county, and on the other side of which stream lies another county. *Cass County v. Sarpy County*, 63 Neb. 813; *Keiser v. Commissioners of Union County*, 156 Pa. St. 315; *State of Alabama v. State of Georgia*, 23 How. (U. S.) 505; *Dodge County v. Saunders County*, 70 Neb. 442.

Nor does it make any material difference that all the

bridge except the south portion is within Dawson county. *Dodge County v. Saunders County*, 70 Neb. 442, on rehearing, 70 Neb. 451. It is said in the syllabus of the first opinion: "The banks of a river are essential parts thereof, and, when a county boundary is fixed at 'the south bank,' the river may be said to divide the county from the one on the opposite side, within the meaning of section 87. The purpose of said section, and the ones immediately following, is to provide for bridges which are rendered necessary in order to travel from one county into an adjacent one, and to divide the cost between the two, and the statute should be construed, if possible, so as to give effect to the apparent intent of the legislature." In the opinion on the rehearing Judge SEDGWICK, delivering the opinion of this court, said: "The bridge in question being confessedly located mainly in Dodge county, it is contended that the legislature would not have authority to require Saunders county to expend the funds of that county in repairing a bridge outside of its jurisdiction; but this proposition seems not to be supported by authority." This court then quotes from the second paragraph of the syllabus of the opinion in *Washer v. Bullitt County*, 110 U. S. 558: "At the common law and also by statute, a county may be required and authorized to build and maintain, at its own expense, a bridge or highway across its boundary line, and extending into the territory of an adjoining county." The court also quotes from the opinion in *County of Mobile v. Kimball*, 102 U. S. 691, announcing the same doctrine; and, quoting from a Maryland case, it is said: "A county is one of the territorial divisions of a state created for public political purposes connected with the administration of the state government, and, being in its nature and objects a municipal organization, the legislature may exercise control over the county agencies, and require such public duties and functions to be performed by them as fall within the general scope and objects of the municipal organization."

In the body of the opinion on the rehearing it is said:

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"The fact that the body of the water of the river is in Dodge county, and that the bridge will therefore be mainly outside of the territorial limits of Saunders county, is not an important factor in determining the issue. The question is, what is the meaning of the expression, 'Streams which divide counties.' * * * The bank is that part of the river or stream which retains the water, and it seems, therefore, reasonable that the word stream as used by the legislature when applied to a river, as in this case, must be construed to mean the whole of the river, including the bank as well as the water and the bed, and, within that meaning, the boundary line here lies within a part of the river, to wit, the bank, so that the river divides the two counties in the sense intended by the legislature."

The Overton bridge is none the less a bridge over a stream which divides counties, within the meaning of section 87, ch. 78, Comp. St. 1909. It was undoubtedly the intention of the legislature to make such bridges, which may be equally used by the inhabitants of both counties, a charge upon both counties. These bridges form an important part of the highways of the state, and these highways are very properly made the subject of legislative action. The counties are municipal subdivisions of the state, the creatures of the legislative will, with which the legislature, within constitutional limitations, may deal as in its discretion seems best. When the bridge was acquired from the Overton Bridge Company, Dawson county, by a resolution, undertook the maintenance of the bridge. We do not think this makes any difference, because Phelps county was not a party to the contract between the bridge company and Dawson county, nor was the contract made between the bridge company and Dawson county for the benefit of Phelps county. The inhabitants of Phelps county equally with those of Dawson county enjoyed the use of the bridge, and the bridge is only a part of the public roads of the state, and the legislature has charged the counties on either side of the Platte river with a share of the maintenance of the bridges built over that river. The

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resolution of the commissioners of Dawson county accepting the bridge and agreeing with the Overton Bridge Company to maintain and repair it does not excuse Phelps county from the obligation imposed upon it by law. In a very recent case (*Buffalo County v. Hull*, 93 Neb. 586), it was held: "The liability of adjoining counties for repairs of a bridge over a stream between them is fixed by statute, and it is within the power of the legislature to alter or amend the statute in that regard. The conditions and extent of the liability depend upon the statute in force when such repairs are made and the liability incurred."

It therefore follows that the judgment of the district court for Phelps county is wrong, and that it should be reversed.

REVERSED AND REMANDED.

NATHAN H. BLAKELY, APPELLANT, v. OMAHA & COUNCIL
BLUFFS STREET RAILWAY COMPANY, APPELLEE.

FILED JUNE 16, 1913. No. 16,916.

1. **New Trial: AMOUNT OF RECOVERY.** A new trial will not be granted in an action for damages because of personal injuries on account of the smallness of the verdict alone, where section 315 of the code was in force at the time the district court refused to grant the same.
2. **Jury: EXAMINATION OF JUROR.** In the examination of a venireman upon his *voir dire*, he will not be deemed to have deceived counsel as to his relations with opposing counsel, when he admits the relations existing between them and answers all questions truthfully.
3. **Appeal: DAMAGES: REVIEW.** In an action for damages for personal injuries, if the verdict is for the plaintiff, only those errors will be considered on plaintiff's appeal which might affect the measure of damages.
4. **Street Railways: PEDESTRIANS: NEGLIGENCE.** The pedestrian should look before he attempts to cross parallel street railway tracks, and if there is an obstruction which interferes with his view he should use additional care.

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APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Affirmed.*

H. S. Daniel, Weaver & Giller and John A. Moore, for appellant.

John L. Webster and W. J. Connell, contra.

HAMER, J.

Nathan H. Blakely, the plaintiff and appellant, appeals from a judgment rendered in the district court for Douglas county in his favor and against the defendant and appellee, the Omaha & Council Bluffs Street Railway Company. It is claimed by the plaintiff that the defendant company was negligent in the operation of one of its street cars, whereby the same struck and injured the plaintiff. The judgment is for \$305. The appeal is upon the theory that the judgment fails to correspond to the injury sustained. In *O'Reilly v. Hoover*, 70 Neb. 357, this court held, as stated in the syllabus: "In an action for personal injuries, a new trial will not be granted on account of smallness of damages." Code, sec. 315. The section of the code referred to read: "A new trial shall not be granted on account of the smallness of damages in an action for an injury to the person or reputation, nor any other action where the damages shall equal the actual pecuniary injury sustained." The section of the code referred to has since been repealed, but, being in force at the time of the trial, must control the action of this court.

The first assignment of error is based upon the examination on his *voir dire* of the juror Gorman. In the same first assignment of error it is said "that said juror Gorman failed to make a full disclosure of his business connection with the defendant's attorney, W. J. Connell, in response to questions, proper answers to which would have disclosed such business relationship." In the brief of counsel for the plaintiff it is said: "It is established that the juror was asked by the plaintiff on *voir dire* if he had any busi-

ness relations with defendant's attorney, and the only disclosure thereof by the juror was that he had furnished the attorney's family with livery at times, but not as much as the juror would like, while a full and fair disclosure would have shown that the attorney was a regular customer; that the relationship of debtor and creditor existed between them; that in the month of January, a few days before the trial, and after Gorman had been summoned as a juror for the term of court in which the case was tried, his firm furnished livery to the attorney, which was used by the attorney personally; that the latter had a charge account with juror's firm, which under the usage and custom of the firm had not been closed at the time of trial; that the juror at least thought that the attorney hired all his livery from the juror's firm." The affidavit of Carpenter tends to show that one of the counsel for the defendant, Mr. Connell, had an account with the livery firm of which the juror was a member; that this account was for the use of a carriage or carriages, and Mr. Connell's affidavit shows that the carriage or carriages were ordered by his wife or by some other member of his family. It will be seen that the contention of the plaintiff is that the proposed juror should have made fuller answers to the questions put to him by counsel for the plaintiff. The proposed juror seems to have made no denial of the fact that "he had furnished the attorney's family with livery at times, but not as much as (he) the juror would like." There was no denial of the business relation existing. It was the duty of the counsel for the plaintiff, if he deemed the juror likely to be influenced by a transaction of that kind, to have then and there excused him. He did not do that. After the verdict is rendered comes his first objection. In view of the facts stated, it is perhaps unnecessary to further discuss the contention of counsel for the plaintiff on this point. It is claimed that the plaintiff is entitled to know all the facts so as to enable him to exercise his right of peremptory challenge advisedly. *Basys v. State*, 45 Neb. 261. Plaintiff's counsel, with full knowl-

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edge of the facts, allowed the venireman to be accepted and to be sworn as a juror, and to sit and render a verdict.

It is contended by counsel for the plaintiff that there was error in part of instruction No. 1, reading: "If you believe any witness has knowingly and wilfully testified falsely, you are at liberty to disregard the whole of such witness' testimony, except such portion as may have been corroborated by other credible witnesses or evidence." It is said that there was no warrant for giving this instruction as there was no evidence that any witness had sworn falsely, and the false testimony must be in regard to some material matter. If the result of the trial had been a verdict for the defendant, this instruction might have been held to constitute prejudicial error, but there was a verdict for the plaintiff, and from this verdict it is evident the jury believed the plaintiff's witnesses. Therefore, if there is error in this instruction, which is certainly not to be commended, then it is not prejudicial error. We do not think that it can be safely assumed that because this instruction was given there was prejudicial error, as there was a verdict for the plaintiff which does not seem to be in disregard of the evidence.

It is also contended by counsel for the plaintiff that there was misconduct of the jury because some of the jurors experimented as to whether they could see a car coming upon the farther track while passing behind another car. The affidavit of Elbert F. Feenan alleges that he, with other jurors whose names he does not mention, stood behind a moving street car on Farnam street, and, looking beyond said moving street car to where a car could be seen approaching upon a parallel track, they endeavored to determine something as to the effect of certain evidence in the case. He does not say what that something was, nor how it was applied to the particular case. Of course the purpose of the affidavit was to show misconduct upon the part of the jury, and in that way to obtain a new trial. Unless it can be shown that the misconduct was prejudicial to the claim of the plaintiff, it furnishes no reason

for a new trial, and as the verdict was in plaintiff's favor no prejudice is shown.

In *Crowell v. State*, 79 Neb. 784, the officer in charge of a jury in taking them to their boarding place conducted them along the street where the alleged burglary was said to have been committed, and two of the jurors made affidavit that they walked slowly past the place and made such observations as they could, and that the moon was shining and a bright electric light was burning in the center of the street, and presumably the conditions as they described them were about the same as when the burglary was alleged to have been committed. There had been evidence by one of the witnesses for the prosecution that he recognized the defendant, and saw him go to the window of the feed store in question and break it and reach in and take a sack of flour. There were affidavits also to show that when they returned to the jury room there was a discussion, and the argument was presented that the light was not sufficient to enable the witness to recognize the accused. Notwithstanding this argument the jury found the defendant guilty, and this court held that the conduct of the jury was not shown to be prejudicial to the defendant. The court said that, while it would have been better if the officer had conducted them by another route, the court was not prepared to say that what had been done was misconduct; that if it had any effect at all upon the jury it was in some measure to shake the confidence of the jury in the truth of the statement of the witness for the prosecution who claimed to have recognized the accused. The opinion of this court is sustained by cases from other states which it cited.

It is claimed the court erred in giving to the jury on its own motion instruction No. 6, relating to contributory negligence. This instruction was not prejudicial to plaintiff, and the jury found in his favor.

We have examined the other alleged errors, and are unable to find any error which seems so far prejudicial to the plaintiff's rights as to require the reversal of the judg-

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ment and a new trial. The plaintiff has recovered. Only those errors that go to affect the measure of the plaintiff's damages are properly to be considered. We have been unable to find any such.

The judgment of the court below is

AFFIRMED.

**LORANDO D. BLAIR, APPELLEE, v. SHERIDAN COUNTY,
APPELLANT.**

FILED JUNE 16, 1913. No. 16,986.

Elections: EXPENSES: MILEAGE FEES. Where the plaintiff, who was the clerk of the election board, carried the election returns from the polling place to the county seat, where he delivered them to the county clerk, and in going to and returning from the county seat he "traveled over the only available route between said places, a distance of 131 miles," and the route was the shortest railroad route between such points, "and said route was and is the route generally traveled by people between said places," and the shortest distance traveling by team "is a distance of 60 miles through the sand-hill country," and "ordinary traveling by team in ordinary weather takes * * * a day and a half to make the trip, or three days to make the round trip," and by the railroad route actually traveled "it took plaintiff eight hours to make the trip," and before returning it would be necessary to remain over in the county seat 33 hours, and the foregoing facts were stipulated, and on a trial in the district court without a jury the court rendered judgment for plaintiff upon his claim for mileage by the railroad route at 5 cents a mile, this court will not declare that the distance was not "necessarily traveled," or that the district court erred in so holding.

FAWCETT, J. I cannot approve this syllabus.

APPEAL from the district court for Sheridan county:
WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

R. L. Wilhite, for appellant.

Boyd & Barker, contra.

HAMER, J.

The defendant county has appealed from the judgment of the district court for Sheridan county. The plaintiff alleges in his petition that Sheridan county is duly organized; that he is himself a resident taxpayer and voter of Reno precinct in that county; and that at the general state election held on the 2d day of November, 1909, within Reno precinct in said county, he, the plaintiff, was the duly appointed and acting clerk of the election board for said precinct, and that he performed all the duties on his part to be performed as such clerk of election; that the duties of the plaintiff as such clerk required four days' work on November 2, 3, 4 and 5, 1909; and that it was also part of his duty to transport the returns of said election in his precinct to Rushville, Nebraska, the county seat of the county, and deliver said returns to the county clerk; and that he carried and transported said returns from said Reno precinct to Rushville, Nebraska, where he delivered the same to the county clerk; that said precinct is the extreme southern precinct in said county; and that "the usual traveled road from said precinct and the shortest railroad route between said points is *via* Crawford, Nebraska, *via* the railway lines of the Chicago, Burlington & Quincy Railroad Company and the Chicago & Northwestern Railroad Company, and that the plaintiff in transporting said election returns did travel from Reno, Nebraska, to Rushville, Nebraska, *via* Crawford, Nebraska, over said route above mentioned; that the mileage *via* said route is 131 miles; and that the plaintiff returned to his home from Rushville to Reno, Nebraska, by way of Crawford, Nebraska; that the plaintiff necessarily traveled said route, and that said route is the shortest railroad route between Reno, Nebraska, and Rushville, Nebraska." It is further alleged in the petition that, after performing the said services, the plaintiff filed his claim therefor with the county clerk in the sum of \$22.10, the reasonable value of such services and the fee allowed by the stat-

utes; and that on the 17th day of November the board of county commissioners of said county disallowed said claim, and has ever since refused to pay the plaintiff the sum of \$22.10, or any part thereof.

The answer admits the filing of plaintiff's claim against the defendant county in the office of the county clerk claiming four days' service as clerk of election and \$13.10 as mileage of 262 miles from the polling place in Reno precinct, in Sheridan county, to Rushville, the county seat, and return, and alleges that the county board allowed said claim in the sum of \$16, allowing four days as clerk of election, and for "140 miles traveled in making his returns;" that 70 miles and return, making 140 miles, is the full number of miles "that it is necessary to travel in making said returns;" and that it was wholly unnecessary "for plaintiff to travel 262 miles, as alleged in his petition," and that the amount allowed the plaintiff "was more than sufficient to compensate plaintiff for four days' service and five cents per mile for the number of miles necessarily traveled in making said returns."

There was a trial to the court without a jury upon a stipulation of facts. It is shown by the stipulation that the plaintiff was a resident taxpayer and elector of the county, and that he was the duly appointed and acting clerk of the election board in the precinct of Reno, in said county, and that as clerk of said election board he devoted November 2, 3, 4 and 5, 1909, four days, as clerk of said election board and in transporting the ballots from the polling place to the county seat of said county; that the polling place in Reno precinct and plaintiff's residence in said precinct are in the extreme southern portion of said county, and that the plaintiff in carrying said election returns to Rushville, the county seat, traveled over the only available route between said places, a distance of 131 miles; that the route traveled by plaintiff was the shortest railway route between the polling place in Reno precinct and Rushville, the county seat, and said route was, and is, the route generally traveled by people between said

places; that the shortest distance, traveling by team from said polling place to Rushville, is 60 miles through the sand-hill country; that ordinary traveling by team in ordinary weather takes plaintiff a day and a half to make the trip, or three days to make the round trip; that by the said railroad route actually traveled by plaintiff it took plaintiff eight hours to make the said trip to Rushville, and before returning by said railroad route it is necessary to lie over in Rushville 33 hours.

The court found the allegations of the plaintiff's petition to be true, and "that in making said returns said plaintiff traveled by the usual route of travel between the polling place in Reno precinct, in Sheridan county, Nebraska, to Rushville, Nebraska, the county seat; and that he is entitled to mileage for 131 miles, as claimed in his petition." The judgment was rendered for the plaintiff for \$22.10 and costs.

The matter in dispute involves a construction of the statute as applied to the facts.

Section 9472, Ann. St. 1911, provides that the judges and clerks of election and board of canvassers for the county, at all general elections, shall receive for each day's service \$2, and that "the person making the return of the election to the county clerk shall receive the additional sum of five cents for each mile necessarily traveled." The question in this case is whether the 131 miles and return were "necessarily traveled." Was the plaintiff bound to drive across a rough sand-hill country from Reno precinct to Rushville, or was he at liberty to take the train and to increase his comfort and shorten the number of hours of travel? The stipulation makes the railroad route by way of Crawford "the route generally traveled." The stipulation makes the route traveled the usual route. The stipulation also makes the route which was traveled the route "plaintiff necessarily traveled." If the route was one which the plaintiff necessarily traveled, that seems to dispose of the whole question. The case was tried before the district judge of the district court. His home is at

Rushville, and he has for many years resided in Sheridan county. He is familiar with the roads in his county and with all the surrounding circumstances. He is well qualified to judge of the correctness of the stipulation. His finding and judgment are for the plaintiff. He would not have allowed plaintiff mileage for 262 miles unless he felt that the stipulation and the facts warranted the finding which he made and the judgment which he rendered. We do not clearly see our way to disturb the judgment of the district court.

We have examined some decisions more or less in point. In *Logan County v. Doan*, 34 Neb. 104, the syllabus reads: "The only compensation for serving election notices, to which a sheriff is entitled, is five cents a mile for each mile actually and necessarily traveled."

In *Commissioners of Lyon County v. Chase*, 24 Kan. 774, an important witness in a criminal case, who resided within 17 miles of the place where the trial was subsequently to be had, entered into a recognizance for his appearance at the next term of the court to serve as a witness on the part of the state, and afterward, and before the next term of the court, he changed his residence, removing from Emporia to Boston, a distance of 1,600 miles. It was held that he was entitled "to receive mileage fees for the distance necessarily and actually traveled in going from the state line to the place of trial and returning, and no more." The court seems to have taken the view that the starting place of the witness could not be beyond the boundary of the state. It was said that no power of the state could compel the witness to come from Boston to Emporia, and therefore it was said: "The legislature merely intended that the witnesses should receive mileage fees only for the distance necessarily and actually traveled within the jurisdiction of the court."

In *Cody v. Clelam & Drury*, 1 Pa. Co. Ct. Rep. 9, it is said: "Mileage is to be calculated by the nearest traveled route (1 Pearson, 126), nonresidents to be allowed from the state line. This means by the usually traveled route, whether by railroad or turnpike."

In *Maynard v. Cedar County*, 51 Ia. 430, it was held: "Section 3788 of the code, providing that the mileage of an officer for conveying a convict to the penitentiary shall be computed by the 'most direct route of travel,' is to be construed as intending the route by which the journey can be the most speedily performed." In that case in the body of the opinion it is said: "Travelers now estimate distance rather by time of travel than by miles. The route by which they will most speedily perform the journey is considered the most direct. In the case before us the record shows that the distance by rail between Tipton and Anamosa is sixty-four miles; and by the highway, it is thirty-five. No public conveyance runs by the highway. Those who travel between these towns by public conveyance must take the railway. It is to be regarded, therefore, as 'the most direct route of travel.'"

In *Rebert v. Eline*, 21 Pa. Co. Ct. Rep. 431, it is said in the syllabus: "Where there are two usually traveled routes between residence of witness and county seat, one by rail and the other by turnpike, and of different length, mileage should be taxed according to the route traveled." The body of the opinion fully sustains the syllabus. In that case the distance was 10 miles by the wagon road and 24 miles by the railroad. Mileage was taxed by the railroad route because the witness came that way.

In *Commonwealth v. Heiges*, 4 Pa. Dist. Rep. 184, it is said in the syllabus: "Mileage will be allowed by the route usually traveled by persons attending court. And an allowance is proper where a longer but quicker route by rail is selected in preference to a stage route shorter by actual distance, but longer in time." In that case mileage was computed by the longer route, although it exceeded the other by 54 miles, but it was shorter in point of time.

The stipulation fails to show any public conveyance or means of travel by the shorter route. Without attempting to lay down a general rule which shall determine every case, we feel called upon to affirm the judgment of the

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court below. In this case it seems to be right and to be supported by the facts.

AFFIRMED.

**F. C. COCHRAN, APPELLANT, v. LANCASTER COUNTY,
APPELLEE.**

FILED JUNE 16, 1913. No. 17,341.

Jury: FEES. A juror drawn for three weeks' service in the district court for Lancaster county, under sections 668a to, and inclusive of, 668n of the code, and who appears and serves as a juror in said court during said period, is entitled to receive pay during the full term of such panel, Sundays excepted, unless finally excused from further attendance by the court before the expiration of such three weeks' term, and Saturdays within the period will not be excluded in making the computation of the amount due the juror, even though the juror may have been informed by the court that his attendance would not be required on such Saturdays. See *Spalding v. Douglas County*, 85 Neb. 265.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Reversed.*

G. W. Berge, for appellant.

Jesse B. Strode and George E. Hager, *contra.*

HAMER, J.

This case involves the fees of a juror subpoenaed to attend the district court for Lancaster county for the April, 1911, term of that court. He was subpoenaed to appear for the panel of jurors of said court to commence on the 24th day of April, 1911, and to serve on said panel until he should be discharged. He appeared on the 24th day of April, 1911, and served continuously from and including said day until May 18, 1911, except Sundays and on three Saturdays. He was not finally discharged as a juror until May 18, 1911. At the rate of \$3 a day he is entitled to

\$66 for his services as a juror during the existence of said panel, including the said three Saturdays. After said panel of jurors was discharged, the clerk of the district court filed with the county commissioners the time of the jurors serving on said panel, including the time of plaintiff. On May 20, 1911, the plaintiff filed with the county clerk of Lancaster county his claim for \$66 for services as such juror. The county commissioners of Lancaster county allowed the plaintiff the sum of \$57, but disallowed his claim for \$3 for services on Saturday, April 29, \$3 for services on Saturday, May 6, and \$3 for services on Saturday, May 13, making the total amount disallowed \$9. The claim of the plaintiff is that the defendant county is indebted to him in the sum of \$9 for his services as a juror and that the defendant county refuses to pay the same. It is alleged in the petition that the plaintiff is a traveling man, and that it was impossible for him to leave Lincoln and to render any services for the firm that he represented; that he could not and did not do any other work on the said Saturdays, except to hold himself in readiness for service as a juror under the direction of the court, and that during all of the time the plaintiff was at the courthouse and ready for service as a juror and under the direction of the court.

The answer of the defendant county admits the selection of the plaintiff as a juror, and that he was served with a subpoena to appear and serve and not to depart the court without leave, and that he did appear, and that he served from April 24 to April 28, inclusive, and that on the 28th day of April he was excused by the court from further service until Monday, May 1, at 9:30 o'clock in the morning, at which time the plaintiff again appeared and served continuously from May 1 to May 5, inclusive, when, by order of the court, he was again excused until Monday, May 8, 1911, at 9:30 A. M.; the plaintiff again appeared on Monday, May 8, at 9:30 A. M. and served continuously as a juror until Friday, May 12, 1911, inclusive, when he was again, by order of the court, excused from further

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service until Monday, May 15, at which time the plaintiff appeared and duly served as a juror continuously until Thursday, May 18, 1911, inclusive, when he was finally discharged; that the total number of days actually served was 19, and that the county commissioners allowed him pay for 19 days at \$3 a day, being a total of \$57. The answer also alleged that the plaintiff did not serve as a juror on Saturday, April 29, Saturday, May 6, and Saturday, May 13, and that he was excused by order of the court on each of said days; that this was done in accordance with the rules of practice adopted by the judges of said district court. The rule provides: "Saturday of each week during the term shall be the time for hearing motions; unless otherwise specially ordered no causes will be tried on Saturday." There was an appeal from the action of the board of county commissioners of Lancaster county to the district court. The district court held against the plaintiff, and the case comes here on an appeal from the judgment of the district court.

It is contended with some earnestness that the juror should not draw pay on Saturday because, under the rule of the district court, it is not contemplated that any cases will be tried on that day. An examination of the statute seems to contemplate that during the term for which the juror is drawn, consisting of three weeks, he is expected to be in attendance on the court. Section 668a of the code provides that, in counties having a population of 30,000, or more, and less than 60,000, the county board of commissioners or supervisors shall at or before its meeting in January of each year, or at any time thereafter when necessary for the purposes of the act, make a list of a sufficient number, not less than one-tenth, of the legal voters of each township or precinct in the county, giving the place of residence of each person whose name appears on the list, said list to be known as the jury list. It is provided in section 668d of the code: "All jurors on the regular panels shall serve during the weeks or term for which they were drawn and until discharged from the case

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in which they may be serving, if any, at the expiration of such time, unless sooner excused by the court." It is provided in section 668f that a list of jurors selected as provided in the act "shall be kept in the office of the county clerk, who shall write the name and residence of each person selected upon a separate ticket and put the whole into a box or wheel, to be kept for that purpose." And it is provided in section 668g: "At least twenty (20) days before the first day of any trial term of the district court, the district clerk of such court shall appear at the office of the county clerk, and in the presence of such county clerk, and at least one of the judges of the district court, after the box or wheel containing said names has been well shaken by the county clerk, and without partiality, draw thirty (30) names of persons then residents of said county, for each judge sitting with a jury in said court, as petit jurors for the *first three weeks of that term*." It is further provided in that section that, at the same time and in the same manner, the clerk shall also draw the same number of names as petit jurors for the *second three weeks of that term of jury service*.

It will be seen that these jurors for a panel are called for three weeks. The act provides that they shall serve *during the weeks or terms for which they were drawn* and until discharged from the case in which they may be serving. Section 15, ch. 28, Comp. St. 1911, provides: "Grand and petit jurors shall each receive for his services three dollars for each day employed in the discharge of his duties, and mileage at the rate of five cents for each mile necessarily traveled." Under the act specially applicable to this sort of a jury, the time would seem to be three weeks *during which they are required to attend, unless discharged*. This would seem to contemplate a final discharge at the end of the three weeks. Under the stipulation of counsel made in this case, it appears that the plaintiff is a traveling salesman; that he attended the court as set forth; and that during the three Saturdays mentioned he was unable to engage in the business of selling monu-

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ments for the house that he represented because there was no time sufficient to go to the territory where sales could be made in his business and return to be on hand Monday morning at Lincoln for jury service.

The question here presented is whether the plaintiff can be taken from his usual occupation to serve the public as a juror and be compelled to thereby neglect his own private business during the Saturdays mentioned without pay. But the view we take of the statute disposes of the merits of the case. It is not contemplated that the juror will be excused until the expiration of the three weeks for which he has been subpoenaed, but that he may be if his discharge is final. The question turns upon what sort of a discharge is contemplated by section 668d. There is no provision contained in the statute permitting the discharge of the particular panel until it is finally discharged, either at the expiration of the term of the panel, or afterwards, or before such term expires. There is no flexibility in the statute. "All jurors on the regular panels (which means this sort of a special jury for counties having the population specified) shall serve during the weeks or term for which *they were drawn* and until discharged from the case in which they may be serving, if any, at the *expiration of such time, unless sooner excused by the court.*" The order excusing the jury is to be at "the expiration of such time," except that it may be sooner if it is a discharge from the "term for which they were drawn." In other words, it is not contemplated that the jury will be discharged until it is discharged for the three weeks' term for which it has been drawn. The jury is expected to be in attendance upon the court until it is finally discharged.

In *Spalding v. Douglas County*, 85 Neb. 265, the second point in the syllabus reads: "A juror drawn for three weeks' service in the district court for Douglas county who appears and serves as a juror in said court during that period is entitled to recover for all of the days of said term, Sundays excepted, unless excused from such attendance by the court." We are at liberty to look at the body

of the opinion, where it is said: "Sections 668a-668n of the code have a limited application in the state, and contemplate service by jurors in attendance on the district court during a term of three weeks, unless sooner excused by the court."

It would seem that the author of the foregoing had in mind that the service must be "during a term of three weeks," unless there was a final discharge before the expiration of that time. In that case the plaintiff sued Douglas county to recover for service as a juror for two Saturdays. He alleged "being in attendance upon said court for 21 days," and that compensation for the two days was deducted by the commissioners "for the reason that said two days were Saturdays and that the court was not on said two days engaged in the trial of jury cases." The county filed a general demurrer to the petition, and that was overruled and judgment was rendered in favor of the plaintiff, and the defendant appealed. There was an argument at the bar, as stated in the opinion, that he was excused for two Saturdays during that period, and therefore was not discharging his duties as a juror. But it was alleged in the opinion that it was not stated in the petition that he was excused for the two Saturdays. From this it would seem that the juror alleged that he was in attendance all the time for 21 days, but that the commissioners allege, as a reason for not paying him, that two of the days were Saturdays, and that the court was not engaged in the trial of jury cases during those two Saturdays. It does not follow from that that the juror was not in attendance. Under the facts stated in his petition, he would be deemed to be in attendance and not to be excused. The case cited seems to contemplate that the juror was not excused, and that he could not be excused under the statute, unless excused from further attendance during the term of three weeks for which he had been subpoenaed.

In the instant case there was no final discharge until the end of the three weeks, and being excused from at-

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tendance on the particular Saturdays mentioned is not contemplated by the statute as a discharge or within the power of the court, so far as it may affect the fees to be paid to the juror. He should be paid for the full term for which he was subpoenaed to attend, unless finally discharged before the expiration of that time.

It follows that the judgment of the district court is wrong, and it is

REVERSED.

REESE, C. J., LETTON and FAWCETT, JJ., not sitting.

LIZZIE FARRELL, APPELLANT, v. CHARLES H. DIETRICH ET AL., APPELLEES.

FILED JUNE 26, 1913. No. 16,958.

1. **Trusts: CONVEYANCE OF LAND: RATIFICATION.** In 1893 plaintiff and her husband deeded the land in controversy to D. by general warranty deed, and the deed was soon thereafter recorded. From that time to the commencement of this action, in 1909, no taxes were paid by plaintiff, nor any acts of ownership over the land asserted by the grantors in the deed to D. An action was brought by the county to foreclose the lien for taxes, a decree of foreclosure entered, the land sold at sheriff's sale to R. for \$103.14 more than the taxes, interest and costs, and the surplus was paid into the hands of the clerk of the court. Subsequently D. applied to the court for an order directing the clerk to pay the surplus to him. The order was entered, the money paid as directed, and received by D. At the time of the execution of the deed to D. a bank, of which he was the president, held the promissory note of plaintiff and her husband for quite a large sum. The \$103.14 was credited upon this indebtedness. Subsequently plaintiff had a settlement and adjustment with the bank and D., in which the \$103.14 was accounted to her as a credit. *Held*, a ratification of the conveyance to D., and that plaintiff was not entitled to recover the land more than 16 years after the conveyance.
2. **Taxation: FORECLOSURE OF LIEN: RIGHT OF REDEMPTION.** *Held*, also, that D. prior to the commencement of this action having conveyed his interest in the land to R., who was from the date of

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the purchase in possession thereof, plaintiff was not entitled to redeem from the foreclosure sale for taxes.

3. **Trusts: EVIDENCE.** The evidence detailed in the opinion *held* to sustain the decree of the district court in favor of defendants D. and R.

APPEAL from the district court for Lincoln county:
HANSON M. GRIMES, JUDGE. *Affirmed.*

J. W. James, for appellant.

Wilcox & Halligan, contra.

REESE, C. J.

This appeal is from the district court for Lincoln county. The suit involves the title to the south half of the northwest quarter and lots 3 and 4, all in section 2, township 12 north, range 34 west. The land was patented by the United States to Thomas E. Farrell, the husband of plaintiff, on the 14th day of July, 1893, and he held the title thereto until the 22d day of November of the same year, when he and plaintiff conveyed the premises to Charles H. Dietrich by a general warranty deed. The taxes were paid for some three years thereafter, when the payments ceased. On the 17th day of February, 1902, the county of Lincoln commenced its action against Dietrich, the holder of the record title, to foreclose its lien for taxes, and such proceedings were had as resulted in a decree of foreclosure, when the land was purchased by defendant Robb for the sum of \$200. The total amount of principal, interest and costs at the time of the sheriff's sale amounted to \$65.96, leaving a surplus of \$134.04 in the hands of the sheriff. On the 6th day of June, 1903, Dietrich applied to the court for an order requiring the clerk to pay over to him, as the former holder of the title, the sum of \$103.14. the amount remaining in the clerk's hands. The order was made and the money paid as directed. The date of the sheriff's deed to Robb was December 9, 1902. On the 30th day of June, 1909, Dietrich executed a quitclaim

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deed to defendant Robb, which was recorded on the 17th day of July of that year. This action was commenced on the 9th day of the same month against Dietrich and Robb. It appears that, at the same term of the district court at which the order of confirmation of the sheriff's sale was made, the court entered upon his docket an order setting aside the order of confirmation and all proceedings theretofore had in the case, but at the same term, probably, ran a line through his entry, as if to obliterate it, and on the margin placed the word, "Error," but the order was entered by the clerk at length upon the journal, and it so stood until the 19th day of January, 1910, when, on motion of defendant Robb, as the successor in interest to Dietrich, the court entered what is claimed to be a *nunc pro tunc* order, reciting that the order setting aside the sale "was inadvertently made and made by mistake," and setting aside the order of cancelation, "for the reason that said order and judgment was inadvertently made by the court, and the court did not intend to make that order in this case." There is a sharp contention as to the legal effect of this entry, plaintiff insisting that it was void, for various reasons, while defendants insist that it had the effect of canceling whatever might be the results of the former order. According to the view entertained by us, the question here presented is not deemed of importance, and no further attention will be paid to it.

All the issues herein disposed of were fully and fairly presented by the pleadings, and we do not deem it necessary to extend this opinion to the extent of setting them out in detail herein. On the trial to the court a decree was entered in favor of defendants, dismissing plaintiff's petition, and from which plaintiff has appealed.

It is alleged in the petition that the deed executed to Dietrich by plaintiff and her husband, of November 22, 1893, was made in pursuance of a purpose on the part of Thomas E. Farrell and plaintiff to transfer the title to plaintiff, and that Dietrich, being a friend and confidential adviser to plaintiff and her husband, was selected as a

conduit for conveying the title from the husband to the wife, all believing that the interposition of a third party was necessary to such transfer, but that Dietrich had failed to comply with his agreement to make the deed to plaintiff; that a resulting trust was thereby created, which should be enforced by a court of equity. Defendant insists that, if such was the agreement, it would be an attempt to create an express trust by parol, which is forbidden by statute. It is also insisted that plaintiff and her husband were indebted to the German National Bank of Hastings, of which Dietrich was the president, that the deed was executed for the purpose of securing such indebtedness, and that therefore the deed was, in legal effect, a mortgage. We do not deem it necessary to decide the questions here presented, for, had there been no estoppel and the action been timely brought, plaintiff would have been entitled to recover in a proper action in either event.

Thomas E. Farrell died December 3, 1902, nine years after the execution of the deed to Dietrich, and the amended petition was filed on the 1st day of February, 1910. We are unable to discover from the record before us when the original petition was filed, but it sufficiently appears that the time between the execution of the deed to Dietrich and the commencement of this action was 16 to 17 years. The evidence adduced on the part of the defense tends strongly to prove that probably Mrs. Farrell is mistaken as to the full purpose of the conveyance by her husband and herself to Dietrich in 1893. It is quite reasonable to believe her statement that the land was to be finally reconveyed to her. It is also reasonable to believe that one of the purposes of the deed was to secure the indebtedness of her husband and herself to the bank, for, at that time, the bank held the promissory note signed by both for quite a large sum of money. As we have seen, Mr. Dietrich received \$103.14 surplus remaining after the satisfaction of the county's decree of foreclosure. This sum was indorsed upon the note as a credit. On the 23d

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of April, 1906, plaintiff by her son, who was her duly accredited agent, had a settlement with the bank officers, a memorandum of which was reduced to writing, as follows: "Hastings, Nebraska, April 23, 1906. I have this day compromised and settled with the German National Bank of Hastings, Nebraska, the balance due on an indebtedness arising by reason of and represented by a certain promissory note dated August 24, 1893, for the sum of \$10,000. Secured by real estate mortgage signed by myself and payable to the order of H. S. Dungan and by him indorsed to the order of the German National Bank of Hastings, Nebr. And as part consideration of said settlement and compromise I have released and do hereby release and acknowledge full satisfaction of any claim I have had or may have against Chas. H. Dietrich by reason of his having conveyed by deed to J. F. Heiler, lots 14 and 15, block 29, Johnson's addition to Hastings, under deed dated December 21, 1903. This settlement being a full and complete adjustment and settlement of all matters of difference now existing between the said German National Bank of Hastings, Nebraska, Chas. H. Dietrich and myself. Lizzie Farrell, by Frank E. Farrell as agent." The note was then surrendered to plaintiff, who testified that she thinks it was burned. The memorandum of settlement clearly shows an adjustment of all matters of difference between plaintiff and the bank, as well as between herself and Dietrich. It also appears that the taxes on the land, so far as they were paid, were paid by Dietrich or the bank, not by plaintiff, although she testified that when paid by Dietrich or the bank they were charged up in the bank account against plaintiff's husband. As to that matter the evidence is quite unsatisfactory. There was no showing by the bank upon the subject. It must be conceded, however, that the absence of all care over the property for so long a time, allowing the taxes to accumulate, and the receipt of the proceeds of the sheriff's sale would all seem to indicate an abandonment of the property. Added to this is the absence of knowledge on the part of

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defendant Robb of any claim of interest in the property by either plaintiff or her husband in his lifetime; the presence of the record of the warranty deed from them to Dietrich from December 28, 1893, the date on which it was recorded, and his purchase from Dietrich, must deprive plaintiff of the right to redeem.

The decree of the district court is therefore

AFFIRMED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

**JOSHUA RUSHTON, APPELLEE. V. AMBROSE S. CAMPBELL
ET AL., APPELLANTS.**

FILED JUNE 26, 1913. No. 17,104.

1. **Appeal:** REMAND: RESUBMISSION. The final *per curiam* order in this cause (*McNeny v. Campbell*, 81 Neb. 754, 761), remanding the cause for further proceedings, required a resubmission of the issues upon a later trial in the district court.
2. —: **CONFLICTING EVIDENCE.** The question of the liability of a defendant upon an alleged obligation with others having been submitted to a trial jury upon conflicting evidence, the verdict of the jury will be sustained, unless clearly and manifestly wrong.
3. **Venue.** Where a suit was instituted against A, B, and C in W. county, the service of summons being made upon A in that county, the county of his residence, and upon B and C in C. county, the county of their residence, the jurisdiction of the court over B and C depending upon the joint liability of A with them, the verdict of the trial jury finding that all were jointly liable to the plaintiff on the cause of action pleaded in his petition fixed the jurisdiction over B and C.
4. **Vendor and Purchaser:** RESCISSION: JOINT LIABILITY. It was alleged that A represented to the plaintiff that the title to a certain tract of land was held by B and C, but that A had an interest therein, being one of the owners thereof, and that, upon his false and fraudulent representations as to the title and quality of the land, plaintiff was induced to enter into a contract for the purchase thereof and make a substantial payment thereon. It is

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held that in an action for a recovery of the money paid, after a rescission of the contract, if the allegations of the petition were sustained by sufficient evidence, and plaintiff was entitled to recover the money so paid, all defendants would be jointly liable therefor and a joint judgment against all would be sustained.

5. ———: ———. Where a contract for the sale and purchase of land required the payment therefor to be made at a certain time, but contained no provision as to when the transfer of title should be made, the law implies that the payment and conveyance shall be concurrent acts, and that if upon tender of payment at the time agreed upon the vendor is not able to make the transfer of title, and fails so to do, the purchaser may rescind the contract and recover the money paid thereon.
6. Instructions examined and found not to be harmonious, but the defendants (appellants) were not prejudiced thereby, and the error did not require a reversal of the judgment.

APPEAL from the district court for Webster county:
HARRY S. DUNGAN, JUDGE. *Affirmed.*

C. W. Meeker, P. W. Scott and L. H. Blackledge, for appellants.

Bernard McNeny and J. S. Gilham, contra.

REESE, C. J.

The suit upon the cause of action involved in this case was first instituted by Bernard McNeny, as assignee of Joshua Rushton, against the defendants, and upon trial in the district court the then plaintiff recovered judgment. The defendants appealed to this court and secured a reversal of the judgment and a remand to the district court. The opinion was written by the late ELISHA C. CALKINS, Commissioner, and is reported in 81 Neb. 754, 761, where the principal facts are stated. Upon the cause being remanded to the district court, a second trial was had, the jury failing to agree. A third trial was had to a jury, which returned a verdict against all the defendants, on which a judgment was rendered, and from which they appeal.

In view of the statement of facts contained in the

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former opinion, we do not deem it necessary to encumber the record by a repetition thereof. Prior to the last trial McNeny reassigned the claim to Rushton, by whom the case has since been prosecuted, and who is here as appellee. The issues presented are practically the same as upon the former appeal, and all questions of fact have been retried. Had the final judgment of this court upon the former appeal been entered in accordance with the recommendations of the commissioner, it is quite probable that the conclusion reached might have had an important bearing upon the final determination of the action; but, instead of dismissing the action as to Carpenter, as recommended, the court overruled that part of the judgment and remanded the case for further proceedings, which, in effect, required a new trial of the issues.

As shown by the former opinion, the question of jurisdiction was presented. Carpenter resided in Webster county. Burke and Campbell were residents of Chase county. The suit was commenced in Webster county, where service of summons was had on Carpenter, and service made upon the other two defendants in Chase county. If there was no liability as against Carpenter, the others could not legally be sued in Webster county with service of summons in Chase county. The question of the liability of Carpenter became an important one, as affecting, not only his rights, but those of Burke and Campbell. If Carpenter was interested in the agreement by which Burke and Campbell sold the land to plaintiff, as a party thereto, or had joined with them in the perpetration of any fraud upon Rushton, and Rushton had rescinded the contract, either for fraud or the failure of Burke and Campbell to comply with its terms, and plaintiff was entitled for either reason to recover back the money which he had paid on the attempted purchase of the land, Carpenter would be liable, and the suit could be maintained in Webster county, where he resided and was served with summons.

This question was submitted to the jury upon quite a large volume of conflicting evidence, the claim of plaintiff

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and his witnesses being in support of the alleged statements made by Carpenter to plaintiff, that he was the owner of an interest in the land, that the title was clear and held by Burke and Campbell, as well as statements made to others to the same general effect. This was denied by Carpenter, and it was claimed by him, as well as by Burke and Campbell, that he had no interest whatever in the land nor its sale, and that he did no more than call plaintiff's attention to the property. The written contract of the sale was made by Burke and Campbell, Carpenter signing as a witness only. But the contention of plaintiff is that this was done because it was represented by all the defendants that the title to the land was in Burke and Campbell. It could serve no good purpose to state the evidence upon this part of the case more in detail. It must be sufficient to say that there was a conflict, which it was the province of the jury to settle, as well as the inference to be drawn from the conceded acts and declarations of Carpenter. While the evidence leaves the matter in doubt in the mind of the writer, we are admonished that the jurors were the triers of the fact, and with their findings thereon we must be content. The liability of Carpenter being found against him by the jury disposes of the question of jurisdiction over Burke and Campbell, and leaves the case for decision upon the merits as against the three defendants.

The written contract which furnishes the basis of plaintiff's action is as follows: "This agreement, made and entered into this 11th day of October, A. D. 1906, by and between Joshua Rushton, of the town of Esbon, R. F. D. No. 2, county of Jewell, and state of Kansas, of the first part, and Burke & Campbell, of Imperial, county of Chase, and state of Nebraska, of the second part, witnesseth: That the said party of the second part covenants and agrees to and with the said party of the first part to transfer by warranty deed, together with abstract posted to date showing clear title (to) the southeast quarter of section twenty-nine, in township seven north, of range thirty-

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eight west of the 6th P. M. Possession to be given March 1st, 1907. And the said party of the first part covenants and agrees to pay unto the said party of the second part, for the same, the sum of four thousand (4,000) dollars, as follows, viz: One thousand four hundred fifty dollars cash in hand, receipt of which is hereby acknowledged. Two thousand five hundred fifty dollars on or before January 20th, 1907. In witness whereof, the parties to these presents have hereunto set their hands, the day and year last above written. (Signed) Joshua Rushton. (Signed) Burke & Campbell. Signed, sealed and delivered in presence of (Signed) A. H. Carpenter."

It will be observed that, while this writing fixes a definite time for the final payment, there is no stipulation as to when the deed should be delivered. But, as under such conditions the payment of the price and the delivery of the deed are concurrent acts, the deed was due at the time of, and upon the payment or tender of, the purchase price. *Primm v. Wise & Stern*, 126 Ia. 528; *Webb v. Hancher*, 127 Ia. 269; 39 Cyc. 1334. It may be further noted that the parties so construed the contract. The date fixed for the final payment was January 20, 1907. On that day a tender is alleged to have been made of the amount due on the contract, and demand made for the deed. Defendants did not procure the deed, nor could they, as they did not have the title to the property. They had an option to purchase, but they had not paid the amount due upon their option, and the title was still in the original owner. Not having title at the time when they should have conveyed, they were not in a position to demand an extension of the time in which to make the conveyance, and the tender of the money and demand for the deed, with their inability to convey, gave plaintiff the right to rescind, which he did, and entitled him to a return of the \$1,450 which he had paid. *Webb v. Hancher*, *supra*. At that time there was an unpaid and unsatisfied mortgage for \$1,100 on the land, which should have been satisfied of record before or at the time for the conveyance. Plaintiff was under no

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obligation to pay over the purchase price and trust to defendants to satisfy the mortgage. His contract provided for a "clear title." He was entitled to this upon tender of the amount due at the time provided by the contract for payment.

There was a sharp conflict in the evidence upon the trial as to whether there was a misrepresentation of the value of the land by defendants to plaintiff before the contract of purchase was finally made. A strong showing was made by the defense that the property was actually worth the value placed upon it by the defendants. But, upon the other hand, evidence was produced to the contrary, and this placed the solution of the question in the hands of the trial jury. While the writer hereof, had he been the trier of fact, might have decided this question of fact in favor of the defense, we cannot say that the verdict in that regard is not sufficiently supported by the evidence. However, did plaintiff's right to recover depend upon that question alone, the plaintiff having seen the land and had the opportunity to know its value, we should seriously question his right to recover; but, as we view the case, this is not a controlling question. This subject was properly presented to the jury by the seventeenth instruction, given at defendants' request.

It is claimed by appellants that there is a conflict between the eighth and fifteenth instructions given to the jury. By the second instruction the jury were told that the burden of proof was on the plaintiff, and, before they would be warranted in returning a verdict in his favor, he must establish by a preponderance of the evidence the truth of the material allegations of his petition, not admitted, which were that the sale of the land was made by Burke and Campbell for and on behalf of themselves and Carpenter; that plaintiff was induced to enter into the contract because of statements made by Carpenter that the three were the owners of the land, the legal title being held by Burke and Campbell; that such representations or some of them were false when made; that plaintiff re-

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lied upon them; and that plaintiff or his assignor rescinded the contract on account of such fraudulent representations, and demanded the return of the money paid. The eighth instruction was to the effect that, if the jury found that Carpenter made the representations that Burke and Campbell had a present perfect title to the land and were able to convey at any time, that plaintiff relying thereon paid to Burke and Campbell the \$1,450 as part of the purchase price of the land, that Burke and Campbell did not have the title to the land and were unable to convey, and that plaintiff rescinded the contract therefor, Carpenter would be equally liable with Burke and Campbell. By the fifteenth instruction the jury were informed that, under the undisputed evidence, the title to the land was in Pritchard, the defendants Burke and Campbell holding a lease with option to purchase, and that at the time of making the contract with Rushton they could lawfully make in their own name the agreement made, and the fact that they did not have the full legal title to the premises does not constitute ground for Rushton or his assignee to rescind the contract and demand a return of the purchase money paid. There seems to be no doubt that this instruction is somewhat at variance with other instructions. It was given at the request of defendants, and the three instructions were evidently not so carefully considered as they should have been before being given. But it is not clear that the defense suffered any prejudice thereby. Had the proposition contained in the fifteenth instruction been the only contention in the case, it would have been practically an instruction for the jury to find in favor of defendants; but, as there were other vital issues in the case, it could only have the effect of withdrawing that issue from the consideration of the jury, and we cannot see that the want of harmony between the instructions must of necessity require a reversal of the judgment.

The case is not without its perplexing questions, but, upon a review of the whole record, we are not satisfied

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that the judgment should be molested. It is therefore

AFFIRMED.

FAWCETT, J., not sitting.

SEDGWICK, J., dissenting.

It seems to me that the majority opinion is inconsistent with itself. It states two reasons for allowing the plaintiff to repudiate his contract: That the contract was procured by fraud; and that the defendants did not comply with its terms on their part.

The supposed fraud, as stated in the majority opinion, is in the two statements by Carpenter—that he (Carpenter) was the owner of an interest in the land; and that the title was clear and held by Burke and Campbell. The opinion shows that all the parties knew exactly the condition of the title; that Burke and Campbell had an option to purchase the land, and the plaintiff contracted with Burke and Campbell only, knowing at the time that the legal title was in the third party, and that Burke and Campbell intended to give the plaintiff the title by obtaining the deed from the third party who held the legal title. If Carpenter made the statement to the plaintiff that he was “the owner of an interest in the land,” the plaintiff could not possibly have relied upon that statement or have been deceived thereby. If Carpenter told the plaintiff that the title was clear and held by Burke and Campbell, the plaintiff could not possibly be damaged thereby, because it would make no difference who held the legal title if Burke and Campbell were able to procure the legal title to be conveyed to the plaintiff according to the terms of their contract. It is said in the opinion: “Defendants did not procure the deed, nor could they, as they did not have the title to the property. They had an option to purchase, but they had not paid the amount due upon their option, and the title was still in the original owner.”

The plaintiff caused a written statement to be given to defendants of “our requirements on this title,” in which

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he demanded: "(3) A general warranty deed coming from Lyman B. Pritchard and wife. (4) A bonded abstractor's certificate to the effect that the transfers from Lyman B. Pritchard and wife to Joshua Rushton is properly made. With these requirements we will accept the title." These requirements were fully complied with.

The opinion says that the fact that defendants did not procure the deed on the 20th of January justifies plaintiff in refusing to accept it. The facts, as shown by the abstract, are that the money was to be paid on the 20th of January, and of course the deeds were to be delivered at that time. On the 12th of January the plaintiff by his attorney wrote to the defendant: "Mr. Rushton was in the office today and wanted me to ask you if you would be ready to close the deal upon his land there on the 23d of this month. This would let him have the advantage of the rates. If this is satisfactory to you try and have our requirements ready so we can close the deal all up on that date and get back. I will probably come up for Mr. Rushton, as he wants me to look after the matter for him. Please let me know by return mail if this is satisfactory and you can have the requirements met so I can get back the same day." The defendants at once ordered the papers forwarded to the place where the contract was to be consummated, and they arrived there on the 24th—the deed from Pritchard, the release of the prior mortgage, and complete abstract, and all the papers that had been required by the plaintiff's attorney in his letter of January 18, which is copied in the abstract. The contract did not provide that time is of the essence of the contract, and at the plaintiff's request it was delayed three days, but the plaintiff refused to delay the other day, when he knew that the papers were in transit and had been delayed in the mail.

When this case was here before (*McNeny v. Campbell*, 81 Neb. 754), the court stated at large the facts in the case. The present majority opinion adopts that statement of facts without change, explanation or addition, and yet

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upon the statement of facts the former opinion found that the case must be reversed. This seems to raise a direct conflict between the first opinion and the present opinion. In the last trial the court instructed the jury in the fifteenth instruction that "under the undisputed evidence in this case as to the title of the land * * * being in Lyman B. Pritchard, and the defendants Burke and Campbell" had only an option of purchase, "does not constitute ground for said Rushton or his assignee to rescind such contract and demand a return of the purchase money paid." This is the law of the case as held by all of the authorities.

As to the other representation as to the value of the land, the court in the seventeenth instruction told the jury that, when a purchaser has opportunity to examine the property before he purchases, he cannot maintain an action against the parties on the ground that the vendor made false statements in regard to the value of the property. "Such purchaser is bound to rely on his own judgment in regard to such matters, and not on the statements of the vendor." It is conceded, as stated in the majority opinion, that Rushton went to look at the land himself, and the majority opinion says that the case would not be reversed upon that ground alone, and further says that, "if Carpenter was interested in the agreement * * * as a party thereto, or had joined with them," etc.; but the record shows, and the opinion states, that Carpenter was not a party to the agreement. The agreement was in writing, and it was between Burke and Campbell on the one side and plaintiff on the other.

According to the second paragraph of the syllabus, it is not enough that the verdict of the jury is clearly wrong. It must also be "manifestly" wrong in order to justify a reversal. This is adding something to any and all of the cases that we have heretofore decided.

HENRY STEHR V. STATE OF NEBRASKA.

FILED JUNE 26, 1913. No. 17,539.

Criminal Law: SENTENCE: LAW GOVERNING. Where a crime is found to have been committed before the taking effect of the indeterminate sentence law, the sentence, upon the verdict of the jury finding the accused guilty, should conform to the law in force at the time of the commission of the offense.

OPINION on motion for rehearing of case reported in 92 Neb. 755. *Affirmed and remanded.*

REESE, C. J.

The opinion affirming the judgment in this case is reported in 92 Neb. 755. A motion for rehearing has been filed, and the whole record has been carefully re-examined. We are unable to discover that any prejudicial error occurred during the trial which requires interference by this court. So far as the trial itself is concerned, the defendant seems to have been fairly dealt with. It appears from the record that the defendant is charged with the commission of the offense on the 22d day of January, 1911. The evidence shows that to be the date of the death of the child. The trial was held, and finally terminated on the 27th of November, 1911, when the defendant was sentenced under the indeterminate sentence law for a term of from one to ten years. That law took effect on the 7th day of July, 1911, and, of course, could not be applied to this case as to the sentence to be imposed or method of punishment. In *Forbes v. State*, 93 Neb. 574, after quoting from the indeterminate sentence law, we said: "It seems clear that the legislature never intended this language, in its proper connection with the whole act, to apply to crimes committed before the enactment went into effect. The lawmakers legislated for the future, not for the past. An eminent text-writer has wisely said: 'It is a sound rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative

intention that it should operate retrospectively.' Cooley, Constitutional Limitations (7th ed.) 529." It is practically, if not strictly, the uniform holding of the courts of this country that the indeterminate sentence law cannot operate upon crimes committed prior to the taking effect of the law. *Dial v. Commonwealth*, 142 Ky. 32. See *Stewart v. Commonwealth*, 141 Ky. 522; *Hunn v. Commonwealth*, 143 Ky. 143; *People v. Deyo*, 103 App. Div. (N. Y.) 126; *In re Marion*, 140 Mich. 219; *People v. Casady*, 250 Ill. 426; 12 Cyc. 956, clause b.

It seems quite clear that the district court erred in imposing the sentence under a law not in existence at the time of the commission of the alleged offense, and the cause will have to be remanded for a correct sentence. It is no doubt true that, as the trial was held long after the law took effect, the court and counsel overlooked the fact that the prior law must govern, and that counsel when presenting the cause to this court also did the same, and the subject was not called to our attention either in briefs or arguments, nor in the motion for rehearing, and was therefore overlooked in the opinion heretofore filed; but the question presents, not only a vital constitutional right of defendant, but one involving the jurisdiction of the court to render the sentence imposed, and cannot be ignored. We also think it not improper to suggest that, under all the circumstances of this case, the new sentence imposed should be of the shortest possible time, considering the length of time defendant has already served, and that he should be discharged from custody.

The judgment of the court, therefore, is that, no error appearing in the record before us up to the time of pronouncing sentence, the judgment of the district court as to all such matters is affirmed, and the case is remanded to that court for the rendition of a valid judgment upon the verdict.

Conviction affirmed, and case remanded for judgment.

AFFIRMED AND REMANDED.

L. ROSE BLAKESLEE, APPELLEE, v. EDWARD R. VAN DER SLICE, APPELLANT.

FILED JUNE 26, 1913. No. 16,976.

1. **Appeal: PLEADING: AMENDMENT: DISCRETION OF COURT.** It is usually a matter within the discretion of the district court to allow or refuse to allow a pleading to be amended to conform to the evidence; and, in order to predicate error in allowing the amendment, it must be shown that the trial court has abused its discretion.
2. ———: **CONFLICTING EVIDENCE.** Plaintiff broke her arm, and sued the defendants for a failure to properly reduce and treat the fracture. It was claimed by the defendants that plaintiff violated their instructions not to use the broken arm or hand. The evidence on that question was conflicting. *Held*. That the verdict of the jury should not be disturbed.
3. ———: **VERDICT: REVIEW.** When the issues in such an action are all submitted to a jury under proper instructions, the verdict will not be set aside, unless it is shown to be clearly wrong.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed*.

Meier & Meier and George A. Adams, for appellant.

Wilmer B. Comstock, H. A. Reese and A. G. Wolfenbarger, contra.

BARNES, J.

Action to recover damages alleged to have been sustained by the plaintiff for the failure of the defendants to properly reduce a fracture of her arm. A trial in the district court for Lancaster county resulted in a verdict and judgment for the plaintiff for the sum of \$400, and the defendant Van der Slice has appealed.

It appears that on the morning of the 10th day of February, 1909, the plaintiff suffered a fracture of the radius of her left arm, commonly called the Colles' fracture, as the result of a fall. Within about 30 minutes after

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the accident happened, Doctor Richard E. Howard and Doctor Edward R. Van der Slice appeared at the plaintiff's home, and, working together, attempted to reduce the fracture and repair the plaintiff's injury. During the next five days immediately following the injury, Mrs. Blakeslee did not leave her bed, and during the time from February 9 until February 21 one of the defendants called upon her almost daily, and on each occasion he was informed that the arm felt full and twisted and out of place. On the 21st day of February, 1909, while both Doctors Howard and Van der Slice were present, they first removed the dressing from the arm, and their attention was again called to the extremely swollen and painful condition of the injury. At that time they rebandaged the arm, replacing the same splint upon the forearm and hand, and left it in the same condition in which they found it. From February 21 until March 5, 1909, the defendant Howard continued to call on Mrs. Blakeslee, and during that time on several occasions removed the bandage and examined her arm. On Saturday, the 6th day of March, the plaintiff called on Doctor Williams of University Place, and submitted the injured arm to his examination. Doctor Williams found that it was very much swollen, and, according to his diagnosis, the bone was broken and was then out of place. On Sunday morning, March 7, 1909, Doctors Williams and McKinnon called at the home of Mrs. Blakeslee, made an examination of her injured arm, administered an anæsthetic, and pulled and manipulated the arm in order to get the broken bones in apposition. They claimed to have set the arm, or reduced the fracture. They testified that on that date the broken bone had not yet united. Doctor Howard testified that on the 21st day of February, 1909, the broken bone of the injured arm was in the same position as left by himself and Doctor Van der Slice at the time they attempted to reduce the fracture. It should be observed that Doctor Howard testified that they did properly reduce the fracture at the time the injury occurred. After Doctors Williams and McKinnon

had treated the fracture, the swelling and pain subsided, and the twisted feeling left the plaintiff's arm.

Complaint is made of the admission of evidence of pain. It is difficult to see how the injury or the injured condition of the arm could be described without using the words "pain" and "swelling," and, as we view this assignment of error, it is quite immaterial.

Complaint is made because plaintiff was allowed to amend her petition at the close of the evidence. On pages 454 and 455 of the record it is shown that the plaintiff asked leave to amend the petition by changing the word "ulna" to the word "radius" in furtherance of justice and to conform to the facts proved. The record shows that leave to amend was granted over the defendants' objections. To our minds it seems clear that the amendment asked for could not and did not in any way mislead the defendants. The case had been tried upon its merits, and whatever discrepancy appeared in the petition was properly cured by the amendment, and the defendants were not thereby misled to their prejudice.

In *Chicago, R. I. & P. R. Co. v. Shaw*, 63 Neb. 380, it was said: "It is usually a matter within the discretion of the trial court to allow or refuse to allow a pleading to be amended to conform to the evidence given on the trial." See, also, *Brown v. Rogers & Bro.*, 20 Neb. 547. There is nothing contained in the record which shows, or tends to show, that the district court abused its discretion in allowing the amendment in question.

Error is also assigned for permitting counsel to propound numerous questions to witnesses pertaining to a book or treatise entitled "The Treatment of Fractures," by Scudder. There is nothing contained in the record showing, or tending to show, that this work, or any part of it, was introduced in evidence, and whatever reference there was made to it, so far as we are able to see, was confined to the fact that there was such a work, and was without prejudice.

It is also contended that the failure of the district court

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to direct the jury to return a verdict for the defendants was prejudicial error. It appears that the evidence in this case as to the manner and effect of the treatment given by the defendants to the plaintiff's injury was conflicting, and therefore it would have been prejudicial error for the court to direct a verdict for the defendants.

Defendants assign error in giving the fifth instruction. By that instruction the jury were told that if the plaintiff was guilty of negligence in the care of her injured arm, or in the use of the same, such negligence causing, or contributing to cause, the injury she claims, then in that case she could not recover. But, on the other hand, if the jury should find that she was not negligent in that respect, then the plaintiff would have the right of recovery. While this instruction, considered alone, might be erroneous, yet, when considered with the other instructions given, error could not be predicated thereon.

Considerable stress was given to the evidence tending to show that plaintiff had been using her arm and hand prior to the time it was treated by Doctors Williams and McKinnon. We think the evidence on that question is entitled to very little, if any, weight. The principal testimony tending to show that plaintiff had used her arm at all were statements alleged to have been made by the plaintiff's daughter. This was clearly hearsay evidence.

Again, the defendants both testified that, when they examined the plaintiff's arm on the 21st day of February, they found it in the same condition in which they had left it; that it had not been displaced or disturbed in any manner. We are therefore inclined to the view that the instruction complained of correctly stated the law. As we view the record, the case was submitted to the jury upon conflicting evidence and under proper instructions, and we feel unable to disturb the verdict.

The judgment of the district court is therefore.

AFFIRMED.

REESE, C. J., ROSE and HAMER, JJ., not sitting.

JAMES BELL ET AL., APPELLANTS, V. CITY OF DAVID CITY
ET AL., APPELLEES.

FILED JUNE 26, 1913. No. 17,329.

1. **Municipal Corporations: POWERS: ELECTRIC LIGHT PLANT.** A city or village has the power, under the provisions of section 8704 *et seq.*, Ann. St. 1911, to construct and operate a municipal electric light system for the purpose of furnishing lights to the city and the inhabitants thereof.
2. ———: ———: ———. Under our statutes the city may use the engines and power of an electric light plant to pump water for the use of the city and its inhabitants.
3. ———: ———: ———: **LIABILITY.** In constructing such a system, due regard must be given to the rights of the owners of the present system. The municipal system should be so constructed as not to unnecessarily interfere with the property rights of the owners of the present plant, and in case of necessary interference the city will be liable for the injury sustained.
4. ———: ———: ———: **INJUNCTION.** The city having denied that it will construct its light plant in such a manner as to interfere with the property rights of the owners of the present system, and introduced proof to sustain that allegation, *held* that plaintiffs are not entitled to enjoin the construction of the municipal plant before there is actual or threatened interference.

APPEAL from the district court for Butler county: BENJAMIN F. GOOD, JUDGE. *Affirmed.*

A. M. Post and Roper & Fuller, for appellants.

John J. Sullivan, Arthur J. Evans, E. A. Coufal, J. J. Thomas and C. M. Skiles, *contra.*

BARNES, J.

This action was commenced in the district court for Butler county by James and Samuel Bell against David City and the officers of that city to enjoin them from constructing and maintaining an electric light system in said city. A temporary injunction was allowed, but upon a

trial of the merits the injunction was dissolved, the action was dismissed, and plaintiffs have appealed.

It appears that plaintiffs had been granted a franchise to build their electric light plant on the streets, alleys and public grounds of the city, and that they have constructed it accordingly. It further appears that the plaintiffs have a right of occupancy where they have placed their lines and poles and other necessary property in building their plant. No company would have a right to interfere with the property of the plaintiffs, or with its necessary occupancy of the location where their lines are situated. The rights of the city in that regard are the same as those of any other company which might obtain a franchise and proceed to erect a second plant. It is also true that the plaintiffs do not have any exclusive right to operate an electric light plant in David City, and the city therefore has a right to proceed to build another part, but must of course follow the law in so doing.

The question is very much discussed in the brief as to the right of the city to build a power plant, or to build a combined light, water and heating plant. There is no statute authorizing the city to build a power plant, and therefore it may be said that it would not be allowed to build a power plant as such. Neither is there any statute authorizing the city to build a combined plant. The question whether the city is violating the law and attempting an unlawful expenditure of the taxpayers' money in building a power plant, and in building a combined light and water plant, is the question most discussed by the plaintiffs. This subject should be considered from two different points of view. The city is authorized, for instance, to build a light plant to furnish light for the public streets of the city and to its inhabitants. When such a plant is built the city would probably not violate any law if it sold to the citizens power which is necessarily produced in the act of furnishing electricity for lights, and so the fact that furnishing power might be incidental to an operation of their light plant, or the fact that they intend to furnish

heat from the light plant, would not necessarily be a violation of the law.

Again, if the city builds a light plant, and then from the engines of its light plant furnishes the power to pump the water for the use of the city and its inhabitants as an incidental use of the light plant, we do not see why that should be considered a violation of the law.

Considering the question from the other point of view—that is, from the point of view of raising the money at the expense of the taxpayers for these projects—as there is a special statute authorizing the construction of light plants, and another authorizing the construction of water plants, the taxpayers in subjecting their property to the expense of constructing these plants have a right to know what is to be done with the money. When they vote to bond the city for the purpose of constructing the water plant, they have a right to know that the money so raised upon the bonds for that purpose will be used only for the construction of a water plant. And so, when they vote money for a light plant, they have a right to know what the specifications for the light plant are, so they may determine whether the amount of money asked for is necessary for the purpose of erecting a light plant. They also have a right to know that the money so raised will be used to erect a light plant, and for no other purpose. The fact that the light plant, if it is built according to the specifications upon which they voted bonds, is to furnish power, or incidentally to furnish heat, and the power is to be used for private consumers, and for operating the water plant of the city, if those uses are incidental, and the bonds are voted strictly for the construction of the light plant, it does not seem that it would be a violation of the intention of the legislature in framing these statutes. We do not think that they could vote bonds to raise a certain sum of money to build a light plant, and also vote bonds to raise a certain other sum of money to construct or enlarge a water plant, and then transfer the money so raised from one fund to the other. The defendants by their answer and

by their testimony show that such is not the intention, and therefore we are satisfied that the injunction, so far as this branch of the case is concerned, was properly denied.

It is strenuously contended by the plaintiffs that the method by which the defendants intend to build their light plant is bad, that a construction according to their plans will interfere with plaintiff's plant, and damage them greatly. The defendants alleged in their answer, and testified on the trial, that it is not necessary to build their plant so as to interfere with the plaintiffs' property rights, and that they do not intend to do so. We suppose there is no doubt that the defendants will not be allowed to build their plant so as to unnecessarily interfere with the plaintiffs' plant; nor would they be allowed to build so as to necessarily interfere with the plaintiffs' plant, without liability to compensate the plaintiffs for whatever damages they may sustain. But the defendants deny that they intend to build a plant so as to interfere with the plaintiffs' plant, and therefore the time for plaintiffs to apply for an injunction is not yet ripe. If, however, it shall appear when plaintiffs construct their plant that it is being constructed in such a manner as to unlawfully interfere with the property rights of the defendants, and by such construction it is attempted or threatened to damage the plaintiffs' plant, then proceedings to enjoin defendants from so doing may be in order, and the plaintiffs may, at any future time, obtain such injunction.

As we view the record in this case, the injunction was properly dissolved and the action dismissed. The judgment of the district court is therefore

AFFIRMED.

REESE, C. J., LETTON and FAWCETT, JJ., not sitting.

**MINDEN-EDISON LIGHT & POWER COMPANY, APPELLANT,
V. CITY OF MINDEN ET AL., APPELLEES.**

FILED JUNE 26, 1913. No. 17,629.

1. **Municipal Corporations: ELECTRIC LIGHT BONDS: TIME OF PAYMENT.** The proposition on which the electric light bonds in question were voted examined, and *held* that it provides that the bonds are to be made payable in twenty years, and redeemable at any time after five years from the date when they are issued.
2. ———: **POWERS: TAXATION.** Where a municipal corporation is authorized to create an extraordinary debt by the issuance of negotiable bonds, it has the inherent power to levy taxes sufficient to meet the payment of the principal and interest of such bonds at maturity, unless the law which confers the authority, or some general law in force at the time, clearly manifests a contrary legislative intention.
3. ———: ———: **ELECTRIC LIGHT PLANT.** Plaintiff's franchise examined, and *held* that it contains no provisions which prevent the city from constructing and operating another electric light system.
4. ———: ———. A city of the second class or village may house the machinery necessary to operate its electric light system in the same building with the machinery used in operating its water plant.
5. ———: **BOND ELECTION: VALIDITY.** The fact that, in the discussion of the proposition to vote bonds to construct an electric light system, certain persons express an opinion that the surplus revenues arising from the operation of the lighting system could be used to help pay the principal and interest on the bonds, does not render the election void.

APPEAL from the district court for Kearney county:
HARRY S. DUNGAN, JUDGE. *Affirmed.*

J. L. McPheely, Adams & Adams, and P. A. Hines, for appellant.

O. P. Anderbery, contra.

BARNES, J.

This action was brought by the Minden-Edison Light & Power Company against the city of Minden to enjoin the issuance and sale of \$15,000 in bonds voted by the electors of that city to establish an electric light system. A temporary injunction was issued by the county judge of Kearney county, and upon a hearing of the case in the district court for that county the injunction was dissolved, the action was dismissed, and the plaintiff has brought the case to this court on appeal.

It is the contention of the plaintiff that the bonds in question are void on account of the language contained in the notice of election providing for the time of their payment. The language of the notice was: "Shall the city of Minden, Kearney county, Nebraska, borrow money and issue the bonds of said city in the sum of \$15,000, in denominations of \$100, or any multiple thereof, bearing interest at such rate as the mayor and city council may determine at the time of issuance of said bonds, not to exceed $5\frac{1}{2}$ per cent., payable semiannually, principal and interest payable at the fiscal agency of the state of Nebraska, city of New York, state of New York; said bonds to mature 20 years from the date thereof, but, at the option of the city of Minden, payable at any interest pay day in the order in which bonds are numbered from one up to and including the last, and in any event payable at any time five years after the date of their issuance."

It is urged that this is a violation of the provisions of the statute in force at the time the election was held, and that by the language of the proposition submitted the bonds may be made payable in less than five years from the date of their issuance. We think the proposition is not vulnerable to the plaintiff's contention. The proposition on which the bonds were voted clearly means that they are to be made redeemable at any time after five years from the date on which they are issued, in the order in which they are numbered, and not payable at any earlier date.

The language used might have been made plainer, but it seems clear to us that the words, "payable at any interest pay day in the order in which bonds are numbered from one up to and including the last," are limited by the expression, "in any event payable at any time five years after the date of their issuance." Such is the construction which the defendants have placed upon the proposition by their answer and the evidence, as shown by the record.

It is next contended that the bonds are void because there is no provision in the law under which they are voted for levying a tax to pay the principal and interest. It is true that prior to April 23, 1913, there was no provision for levying a tax in the sections of the statute authorizing the voting of these bonds. Since April 21, 1913, there has been made ample provision for such levy.

In *Ralls County Court v. United States*, 105 U. S. 733, it was held that, where authority is granted to a municipality or subdivision of the state to contract an extraordinary debt by the issuance of negotiable securities, it has the power to levy taxes sufficient to meet such debt at maturity, unless the law which confers the authority, or some general law in force at the time, clearly manifests a contrary legislative intention. This case points out the distinction between the power of the city to issue the bonds in question and those where there was a limitation in the act authorizing the issuing of bonds. There is no such limitation in the act under which the election was held.

In *Loan Ass'n v. Topeka*, 87 U. S. 655, it was held that a law which authorizes a town to contract debts or other obligations payable in money implies the duty to levy taxes to pay them, unless some other fund or source of payment is provided.

In *United States v. New Orleans*, 98 U. S. 381, it was held that, when authority to borrow money or incur an obligation to execute a public work is conferred upon a municipal corporation, the power to levy a tax accompanies it without any special mention that such power is granted.

It is next contended that the election is void because the petitions ask that the mayor and city council have power to provide for the establishment and maintenance of an electric light system for the city, in accordance with sections 8704-8708, Ann. St. 1909, at a cost of not to exceed \$15,000. It is argued that the proposition was misleading for the reason that the petitions use the words "light system," instead of the words "lighting system." We think this variance in the language is wholly immaterial.

It is further contended that the plaintiff light company has an exclusive franchise, or such a contract for lighting that it will bar the city for 50 years to construct its own system. It is not argued that the franchise by its terms gives to the light company an exclusive contract; but it is contended that the contract with the city of Minden for street lighting cannot be violated by the city by constructing a municipal plant. To this contention it may be answered: First, that there is no contract with the company by which the city of Minden is bound to take street lights; and, second, even if such a contract exists, the city can continue to perform the obligations existing under the contract, and at the same time construct and operate a municipal lighting system for itself. If the franchise to the present company were by its terms exclusive, such a franchise or contract is prohibited in direct terms by the constitution of this state. Section 5 of the present franchise provides that the company agrees to furnish free lights of a certain type to the city at four street intersections to be selected by the council; and for every arc light required to be taken by the city payment shall be made on a certain basis. It is not disputed, however, that the light company furnished the required lights free, and, if the city of Minden should decide it did not need the lights now running, it could order them stopped, and the present company would have no option in the matter. Even if it were held that the light company does have a contract for four arc lights upon the streets, a municipal plant might be conducted by the city by the payment for said lights, and there

would be no conflict between the rights of the present company and the one proposed to be established.

In *City of Joplin v. Southwest Missouri Light Co.*, 191 U. S. 150, it was held that there was no implied contract which would prevent the city from selling light to private and public consumers from its municipal plant.

In the case at bar there has been no language pointed out in the franchise whereby the city, in express terms, or even impliedly, has agreed to take any number of lights. But concede, for the sake of argument, that the present lighting company has a contract with the city of Minden for a certain number of lights at a fixed price, until those lights have been shut off, or payment for the same has been refused, the present light company would have no cause of action against the city, and there is nothing in the franchise of the present lighting system which can be made a basis for an injunction.

It is also contended that the city has no power to join its water-plant with an electric lighting system. We think this contention is without merit. It appears that the city of Minden voted water-works bonds and constructed its present system of water-works some 23 years ago, and has now submitted the proposition to construct an electric light plant, and it is the purpose of the city to build additional walls on the west side of the present building housing the water-works, within which to house the electrical machinery to be used in its system of electric lighting. It is said another boiler will be added at the expense of the light fund, and the two boilers used as occasion demands for the generation of electric current and the pumping of water. This is an economical arrangement both as to the expense of maintenance and construction. It is clearly provided by the statute under which the bonds in question are voted that, in cities and villages having and maintaining a system of water-works and a water commissioner, such water commissioner shall be *ex officio* heat or light commissioner, and thus the two systems may be merged into one, and the city supplied, not only with

water, but with electric lights. Section 8997, Ann. St. 1911, provides that the same commissioner shall have charge of both plants, and it is clearly contemplated that they may be constructed together, so that the commissioner can attend to his duties at both plants at the same time. We can see no reasonable objection to this manner of conducting the business, and this contention cannot be sustained.

Finally, it is contended that a fraud was committed upon the voters of the city of Minden by the mayor and city council and the electrical engineer in the campaign prior to the bond election. This contention is based on the suggestion that some of the officers of the city and some of the citizens understood that the surplus money accumulated from the revenues which would be derived from the consumption of an electric current might be applied to the payment of the interest and principal of the bonded debt. The evidence on the part of the witnesses for the city is fairly represented by the testimony of Charles A. Chappell, the city clerk, county attorney, L. W. Hagne, and T. F. Sturdevant, the electrical engineer employed by the city. As we read the record, none of these persons positively stated that the surplus would be so applied, but simply that it might be applied to the payment of the principal and interest of the bonds which went into the construction of the new lighting plant. At most, this was an expression of an opinion, and, so far as the record discloses, the election was conducted, maps were drawn, plans and specifications were filed with the city clerk, and two meetings were held, at which time the questions were fully discussed. The notice of the election was published in both of the newspapers published and in general circulation in the city of Minden, and in fact every phase of the question was placed before the voters of the city. If any misrepresentations or misstatements of fact were made at either of the meetings, there was plenty of opportunity to correct the same. The election seems to have been fairly conducted, and resulted in an overwhelming majority for the issuance of the bonds in question.

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As we view the record, the district court correctly held that the temporary injunction be dissolved and the action dismissed, and the judgment of the district court is therefore

AFFIRMED.

REESE, C. J., LETTON and FAWCETT, JJ., not sitting.

**MARY A. RECTOR, ADMINISTRATRIX, APPELLANT, v. RED
WILLOW COUNTY, APPELLEE.**

FILED JUNE 26, 1913. No. 17,138.

1. **Appeal: DAMAGES.** Where the evidence is conflicting as to the damages to a farm by reason of the establishment of a highway, and the amount of recovery is consistent with the testimony on the part of the county, the verdict will not be disturbed merely on account of the smallness of damages.
2. —: **MISCONDUCT OF ATTORNEY.** While it is improper for counsel to state to the jury the amount of damages allowed by the county board, held that the circumstances set forth in the opinion did not injuriously affect the substantial rights of the plaintiff.
3. **Highways: ESTABLISHMENT: DAMAGES: EVIDENCE.** A proposed road divided a pasture into two tracts, one of which was thus cut off from a supply of water for the cattle. No agreement was shown between the county authorities and the landowner for a connecting runway, and it was shown that a new water supply would cost several hundred dollars. The amount of the verdict indicates that no allowance was made for a new water supply. At the trial the county was permitted to show that a bridge could be constructed by it so as to allow a sufficient runway. Held prejudicial error.

APPEAL from the district court for Red Willow county:
ROBERT C. ORR, JUDGE. *Affirmed on condition.*

C. E. Eldred, for appellant.

Ritchie & Wolff and W. M. Somerville, contra.

LETTON, J.

This case originated in an appeal by the plaintiff from the damages awarded him by the county board for the appropriation of part of his farm for a public highway, and for incidental damages to the remainder of the tract. He claimed damages in the sum of \$1,250. In the district court the jury fixed the damages suffered at \$385, and judgment was rendered accordingly. From this judgment he appeals.

The road established runs through a portion of plaintiff's farm and takes 13 acres of his land. It divides his cultivated land and cuts his pasture into two tracts, necessitating new fences; and the water supply in the pasture, when the road is opened, will all be on one side of the road, so that other provisions must be made for watering stock in the portion cut off. The plaintiff complains that the judgment and verdict are contrary to law, to the evidence, and the instructions of the court, and that the damages are too small. He complains, further, of irregularity on the part of defendant's counsel in stating in the hearing of the jury the amount of damages allowed by the county board, and that there was error in permitting the introduction of testimony showing that a bridge could be erected and used as a runway for plaintiff's cattle from one portion of his pasture to the other. The plaintiff's witnesses value the land taken at from \$35 to \$40 an acre, while those for the defendant place the value at from \$17 to \$25 an acre. There is evidence, therefore, to sustain a finding as to this item as low as \$221, and as high as \$520. Plaintiff's witnesses estimate the entire depreciation in value of the farm at from \$2,000 to \$2,500, while the testimony on behalf of the defendant, while meager, indicates that the value of the whole farm, except for the value of the land taken, would be affected but little. Plaintiff testified fully as to the necessity for and the cost of new fences, and of a new water supply.

As to the general assignments of error, we think they

cannot be sustained. There was a conflict of evidence, which was submitted to a jury of the vicinage, and there seems to be no reason to disturb the verdict for lack of evidence to support it.

The complaint is made that the court erred in allowing counsel to state the amount of damages allowed by the county authorities. This does not seem to us to be of much consequence. Counsel said: "Defendant now offers in evidence the remainder of page 130 of record No. 4, commencing with the words, 'claim for damages,' and ending with the words, 'allowed by the board, \$315,' which has been identified by the reporter as defendant's exhibit A. Plaintiff objects, as incompetent, improper, and prejudicial to plaintiff, and asks the court to admonish the jury to disregard the remarks of the attorney. The court: They are only making an offer. Plaintiff excepts. The court: The objection is sustained at this time. Defendant excepts." The record of the commissioners' proceedings showing the amount of damages claimed and allowed was then offered in evidence, but was excluded. Two of the county commissioners were witnesses, and testified to a low estimate of the value of plaintiff's land and of his damages. We think the substantial rights of the plaintiff were not injuriously affected by the ruling of the court, and cannot reverse the case for this reason.

The point to which most of the argument in the case was directed, and as to which the court is most in doubt, remains to be considered. After the plaintiff had testified that it would cost \$300 to provide a water supply for that portion of the pasture cut off by the road, the following cross-examination took place: "Q. If a bridge was put in, it could be used as a runway, could it not? Plaintiff objects to this question as calling for a conclusion. Objection overruled. Plaintiff excepts. A. If it was allowed by law. Q. You have asked for one, have you not? Plaintiff objects to this question as immaterial and improper cross-examination. Objection overruled. Plaintiff excepts. A. Yes; I asked for one. Q. And if it were put in and you

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used it, it would do away with the necessity of a pumping plant, would it not? Plaintiff objects to this question as immaterial, incompetent, and improper cross-examination. Objection overruled. Plaintiff excepts. A. Yes; it would." F. S. Lofton, one of the county commissioners, testified as to the road dividing the pasture, as follows: "As you go down the road there, that is quite a steep bank, probably 14 feet down on the west side; the other side is not so high, probably 6 or 8 feet; it will require a bridge probably 8 or 10 feet high, and it will have to be graded." "Q. This bridge that you mention, would that be sufficiently high enough to afford a runway for his stock? Plaintiff objects to this question as immaterial, incompetent under the issues joined in this case, and no foundation laid for its admission. Objection overruled. Plaintiff excepts. A. Yes, sir. Q. Have you agreed upon a plan in regard to this bridge? A. Yes; we have talked it over. Q. But you haven't agreed upon any plan, as yet? A. No, sir. Q. There is nothing to prevent the commissioners from changing their minds about it? A. No, sir." It seems evident that the damages were assessed at the amount named in the verdict on account of the jury taking the view that no new water supply would be required in consequence of the bridge furnishing a runway for the cattle. The court instructed the jury (after telling them that plaintiff was entitled to the value of the land taken) to ascertain the difference in the value of the land not taken, before and after the establishment of the road, and that in this connection "you should take into consideration the expense of constructing and maintaining fences required by the establishment of the road, if any; the fact that the plaintiff's pasture has been cut in two and a portion thereof cut off from the buildings and the water supply; the expense of procuring and maintaining a water supply for that portion of the pasture so cut off; the fact the cultivated land had been divided into separate tracts; the inconvenience of the dividing of said lands, if any—in other words, you should consider every element of damages, if any, arising out of

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the establishment of the road you find established, by the evidence, if any."

It is insisted by plaintiff that the introduction of this evidence was prejudicially erroneous. There is no doubt that he is correct, unless the county is bound to erect and maintain a sufficient runway for his cattle from one pasture to the other. It is probable that under the facts developed here the county could be compelled to furnish and maintain such runway if the judgment of the district court is affirmed. Since, however, it is in the interest of all parties that there be an end to this litigation, we have concluded to reverse the judgment, unless by October 1, 1913, the county authorities erect a bridge of sufficient height and width to furnish a reasonable and proper passageway for plaintiff's live stock at the point where the road crosses the ravine in the pasture.

If such bridge is erected by October 1, 1913, and proof of the fact is made to the judge of the district court within ten days thereafter, the judgment of the district court will stand affirmed, otherwise the judgment will stand reversed.

AFFIRMED ON CONDITION.

ROSE, FAWCETT and HAMER, JJ., not sitting.

JOHN MILLIGAN ET AL., APPELLEES, V. WILSON McLAUGHLIN; CLARENCE BROTHER McLAUGHLIN, INTERVENER, APPELLANT.

FILED JUNE 26, 1913. No. 17,272.

Parent and Child: ADOPTION: PROCEEDINGS: VALIDITY: ESTOPPEL.
While, under the provisions of section 800 of the code, a person desiring to adopt a child should file the petition for adoption in the county of his residence, and the county court of another county should refuse to receive and file the same, yet, the statute being enacted for the benefit of the child, in a case where the facts are that all the interested parties appeared before the

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county court of another county, and agreed, on the one side, to relinquish the child, and consented to its adoption on condition that it should have the full rights of heirship as if born in wedlock, and, on the other, to adopt and make it an heir, and the child is surrendered to the custody of, and remains in the family of, the adopting parent until the death of that parent, which occurred while the child was of tender years, the collateral heirs of the deceased adopting parent are estopped to deny the validity of the adoption proceedings and that the child is entitled to inherit.

APPEAL from the district court for Logan county:
HANSON M. GRIMES, JUDGE. *Reversed.*

Wilcox & Halligan and J. G. Mothersead, for appellant.

Warren Pratt, contra.

LETTON, J.

This was an action in partition. A question of title arose in the case, the solution of which depends upon whether or not certain proceedings seeking to adopt Clarence Brother McLaughlin in the county court of Custer county were valid and effectual, or, if ineffectual, whether there was a contract of adoption which will be specifically enforced. The record shows that on October 3, 1906, Mary McLaughlin filed a petition in the county court of Custer county setting forth that "she resides in Logan county, Nebraska," and that Clarence Brother McLaughlin "is a minor male child under the age of 14 years, to wit, of the age of two years on the 23d day of April next; that they do hereby declare that they (and each of us) do freely and voluntarily adopt said child as their own, upon the terms and conditions following, to wit: They intend hereby to make it an heir of themselves with the right to inherit from them the same as it might do if it was their own child, and that they do hereby bestow upon said minor child equal rights, privileges, and immunities of children born to us (or either of us) in lawful wedlock." The prayer was in the usual form. The petition was signed and sworn to by

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Mary McLaughlin alone. On the same day Martin McLaughlin and Eva McLaughlin, the parents of the child, filed their signed relinquishment and consent to the adoption, setting forth therein that they and the child reside in Custer county, Nebraska; that they are the parents of the child; "that Mary McLaughlin, residing at Arnold, in the county of Logan, state of Nebraska, desires to adopt said child, * * * granting to said minor child * * * full heirship with all the rights of a child born in lawful wedlock;" and relinquished their right to the custody of the child and right to its services, "to the end that said child shall be fully adopted by the said Mary McLaughlin, upon the terms and conditions above set out; and we hereby fully consent to such adoption. And each party waives the issuance and service of notice and asks that the cause be immediately heard and determined." The record of the county court recites that on the same day the matter came on for hearing, "the said petitioners and the said minor child being present in court in person, and also Martin McLaughlin and Eva McLaughlin, parents of said minor child, whose consent is filed." The court then finds that the statements of the petition are true, that Mary McLaughlin is a proper and suitable person to adopt the child, and that it is for the best interest of the child that it should be so adopted. A decree was then entered in conformity with these findings.

Mary McLaughlin was the wife of Wilson McLaughlin. She died intestate in Logan county on the 11th day of March, 1908, leaving no children born of her body. The family home of Wilson and Mary McLaughlin was, at all times material to this controversy, in Logan county, and they never lived in Custer county. Martin, the father of the child, at this time was living in Logan county, and working for his brother, Wilson McLaughlin. Eva McLaughlin, his wife, the mother of the child, was a resident of Custer county, and the child was with his mother. All the parties interested were present in court at the hearing. It is also shown that Wilson McLaughlin consented to

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the adoption, paid for making out the papers, intended to sign and offered to sign the petition for adoption while before the court, but that his counsel said it was unnecessary for him to do so. After these proceedings the child was taken to the home in Logan county, and lived in the family until the death of Mary McLaughlin, and to the time of the trial of this case in district court.

In this action brothers and sisters of Mary McLaughlin are claiming the land as her heirs. The guardian *ad litem* of Clarence Brother McLaughlin intervened and filed a petition claiming an interest in the land for him as the adopted son of Mary McLaughlin. He also set up a contract for his adoption and to make him her heir, and asked that, if the court found the adoption proceedings were invalid, such contract should be specifically enforced, and the boy decreed to have the same interest in the property as if he had been the natural heir of Mary McLaughlin. The district court held that the adoption proceedings were void, and that the county court of Custer county was without jurisdiction. It also refused to specifically enforce the alleged contract, and quieted the title of plaintiffs.

The provisions of the code affecting the determination of the questions presented are section 798: "A married man, not lawfully separated from his wife, cannot adopt a minor child without the consent of his wife; nor can a married woman, not thus separated from her husband, without his consent: Provided, the husband or wife, not consenting, is capable of giving such consent." Section 800: "Any person or persons desiring to adopt a minor child shall file in the county court of the county where the person desiring to adopt said child resides a petition stating that he freely and voluntarily adopts said minor child, which petition shall be signed and sworn to by the person so desiring to adopt. Said petition may state the terms and conditions on which said adoption is desired to be made."

The plaintiffs contend that the adoption proceedings are void for the reasons: (1) That no formal consent of

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Wilson McLaughlin was given to the adoption of the child by his wife; (2) that Mrs. McLaughlin was not a resident of Custer county.

Appellant urges that the consent of Wilson McLaughlin is sufficiently shown by the record and by facts in evidence; and that the appearance of the adopting parents with all the other interested parties was sufficient to confer jurisdiction upon the county court of Custer county. Appellant also contends that the provision of the statute conferring jurisdiction upon the county court where the person desiring to adopt the child resides is directory only. He argues that, though an ordinary civil action must be brought in the county in which the defendant resides or may be summoned, if he enters a voluntary appearance in an action brought in another county, the court of that county would acquire jurisdiction; and, further, that in any event Mary McLaughlin was at least a temporary resident of Custer county, and this is all that is required. He further has pleaded a full performance on the part of the surrendering parents and the child, of the contract of adoption and to make the child the heir of Mary McLaughlin, and maintains that the collateral heirs may not deny the validity of the adoption proceedings or the right of the child to take as an heir.

An examination of cases in other states shows that there are two classes of decisions upon such questions: One based upon the view that, since statutes of adoption were unknown at common law, the powers conferred upon probate or county courts are of such a limited and special nature that all proceedings must be strictly construed, no presumptions will be indulged in, that nothing can be shown outside of the record to supply omissions therein, and that the statutory requirements must be strictly followed in all respects in order to confer jurisdiction. The other class, while adhering to the view that statutory requirements as to jurisdiction must be complied with, take a more liberal view, and hold that in the exercise of the jurisdiction conferred upon them in adoption proceedings

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they are courts of general jurisdiction in that regard, and the same presumption with respect to the regularity of their proceedings apply as in other courts. Under the doctrine announced by this court in *Ferguson v. Herr*, 64 Neb. 659, the latter principle of construction has been adopted in this state, and the decree of a probate court in adoption proceedings "has all the force and effect of a judgment, being subject to collateral attack only for want of jurisdiction."

No written consent to the adoption of the child by his wife was signed by Wilson McLaughlin, but he was present in court at the hearing on the petition, and made no attempt to oppose or contest the granting of the same. The statute does not require the consent of the husband to be in writing. Considering the whole record, the petition, the recital of the proceedings, the findings and the decree, and construing them together in connection with the presumptions of regularity, we think it is sufficiently established that the consent of the husband was granted at the time of the adoption proceedings. *Estate of McKeag*, 141 Cal. 403, 74 Pac. 1039; *Bland v. Gollaher*, 48 S. W. (Tenn.) 320.

Were the proceedings absolutely void and subject to attack by any one for the reason that Custer county was not the county in which the petitioner resided? One of the leading cases on this question is *Appeal of Wolf*, 13 Atl. (Pa.) 760. The Pennsylvania statute of adoption is similar to that of Nebraska in the respect that the petition must be presented to a court "in the county where he or she may be resident." A petition was filed by a person who alleged he was a resident of California, and "is now a temporary resident of the county in which the proceedings were had." Upon the objection that the court acquired no jurisdiction, it was held that the word "resident" included both a permanent and a temporary resident, and that the petition was sufficient to confer jurisdiction. As we shall see later, the proceedings were also upheld on other grounds. See, also, *Van Matre v. Sankey*, 148 Ill. 536, involving the validity of the same adoption proceedings.

In other states, however, adhering to the strict construction rule, residence in the county is held to be a jurisdictional fact. The question is discussed at length in a monographic note to *Van Matre v. Sankey*, 39 Am. St. Rep. 210 (148 Ill. 536). The absurdity of applying the rule of strict construction to a code which expressly provides that the common law rule of strict construction shall not apply to its provisions is pointed out, and it is said: "The statutes frequently require the child to be adopted and the persons adopting it, or both, to be residents of the county where the proceeding takes place. It is doubtful whether the want of such residence, as a matter of fact, is such an irregularity as to avoid the proceedings. So far as the order or other writing is concerned, any statement therein from which it can be reasonably inferred that the parties are residents of the county is sufficient, and, if the adopting parent should falsely state himself to be a resident, both he and his personal representative will be estopped from controverting the statement for the purpose of annulling the adoption. *Estate of Williams*, 102 Cal. 70; *People v. Bloedel*, 16 N. Y. Supp. 837; *Abney v. De Loach*, 84 Ala. 393." In the same note (p. 219) we find the following on the question of estoppel: "If a person resorts to a court for the purpose of obtaining, and does there obtain, a decree or judgment, though it is void as against his adversary, yet if the latter accepts and acts upon it, he at whose instance it is obtained is estopped from asserting its invalidity for the purpose of seeking some advantage to himself, or of subjecting the innocent party to some loss or punishment. * * * If the adopting parent conducts such proceedings, and procures an order or agreement of adoption, and takes the child into his family, where it assumes the place and duties of his child, we think the courts will not permit him to subsequently urge that his proceedings were void. Nor, indeed, up to the present time has any adopting parent ever undertaken to do so, but in several cases, after his death, persons connected with him by ties of consanguinity have tried to

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claim his estate and incidentally to assert that the order of adoption procured and respected by him was void."

It seems apparent that the object of the statute permitting a person desiring to adopt a child to present his petition to the county court of his residence is primarily for the benefit of the child, so that if in after years his right to inherit should be questioned he would be furnished a record within the county of his adoptive parent's residence to which he might readily refer to ascertain his status and what his rights of heirship by adoption were. The evil to be guarded against was apparently the contingency of an adoption being made in one county, the residence of the adopting parents of the child being in another state or county perhaps hundreds or thousands of miles removed. In such case, if the adopted child were ignorant of the facts, he might be deprived of his lawful inheritance for want of the record evidence necessary to substantiate his claim. Taking this view of the statute, we think it was not designed to be used as a sword to cut down the rights of the child, but its intention was beneficent, and its purpose was to protect him against other claimants by furnishing him accessible proof of his adoption. In this case, all the parties appeared before the county court of Custer county; the parents relinquished the child, and Mrs. McLaughlin adopted it as her heir in as solemn a manner as she could do so. She took the care and custody of the child, took it to her home in Logan county, and treated and considered it as her own until the time of her death. During her lifetime she made no attempt to repudiate the obligation which she had entered into, but ratified and confirmed the contract of adoption. The surrendering parents performed to the full extent on their part, and are interposing no objections to the adoption proceedings and no claim to the child. We think no court would, under the facts before us, have permitted Mrs. McLaughlin during her lifetime to deny that the child in her possession had been adopted and had the rights of a lawful heir, and her collateral heirs are equally estopped. As was said in

Appeal of Wolf, supra: "They are not here in the interest nor on behalf of the innocent subject of adoption, but decidedly against the same. They are either strangers to the adoption proceedings, and therefore have no standing in court, or they are privies in blood or in law, and stand in the shoes of Samuel Sankey, through and under whom they claim." It is also said in the opinion that many cases were cited where decrees had been set aside for or in the interest of the adopted child, but none were cited where such decrees were revoked where the revocation would be against the innocent child. See, also, *Estate of Williams*, and *Estate of McKeag, supra*. Even if the county court of Custer county had not acquired jurisdiction, we think the facts proved as to what occurred at the time all parties met in the county court are sufficient to justify a holding that the child is entitled to the specific performance of the agreement to make him the heir of Mary McLaughlin, under the rules laid down in *Kofka v. Rosicky*, 41 Neb. 328; *Pemberton v. Heirs of Pemberton*, 76 Neb. 669; *Peterson v. Bauer*, 83 Neb. 405; *Hespin v. Wendeln*, 85 Neb. 172; *Johnson v. Riseberg*, 90 Neb. 217. The same view is taken in Iowa and in some other states. Note to *Chchak v. Battles*, 8 L. R. A. n. s. 1130 (133 Ia. 107), and cases cited in note.

Controversies over the validity of adoption proceedings are not infrequent. It is to be regretted that where the statutes are so plain, the requirements so simple, and the consequences may be so momentous, more care is not exercised by the county courts, and more attention paid to detail by counsel. Though we are of the opinion that the county court of another county than that in which the adopting parents reside should refuse to receive and file a petition for adoption, under the facts in this case we are of opinion that the collateral heirs of Mrs. McLaughlin are estopped to deny the validity of the adoption proceedings; that the proceedings taken on the day of the hearing, the relinquishment upon conditions, and the delivery of the child, together with the other facts in evidence, con-

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stituted a completed contract for adoption and heirship, and that the intervener is entitled to inherit as the heir of Mary McLaughlin.

The judgment of the district court is therefore

REVERSED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

BOYER-VAN KURAN LUMBER & COAL COMPANY, APPELLANT, v. COLONIAL APARTMENT HOUSE COMPANY ET AL., APPELLEES.

FILED JUNE 26, 1913. No. 17,285.

Mechanics' Liens: PAYMENTS. A, the owner of an apartment house being built by B, a building contractor, under contract, entrusted B with a check for \$750, with the proceeds of which B agreed to pay C, a materialman, \$400, and other specified materialmen and laborers \$350, and to return the receipts therefor to A. B deposited the check in a bank to his own credit in order to draw checks in favor of the respective creditors. Some time before, B had given to C, to whom he was indebted for lumber used in other buildings, an undated check for \$670 to be filled out and cashed by C when notified by B that money had been deposited, from payments upon the other buildings, with which to pay this check. C, without being notified, dated the \$670 check, presented it to the bank, and drew that amount out of the proceeds of the \$750 check given by A. He refused to allow A any credit on his account, but applied the \$670 on the prior indebtedness of B. *Held*, in this, an action against A by C to foreclose a mechanic's lien on A's building, that A was entitled to be credited with the \$670 and interest.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Affirmed.*

A. H. Murdock, for appellant.

Crane & Boucher and J. W. Woodrough, contra.

LETTON, J.

This is an action to foreclose a mechanics' lien upon an apartment building in Omaha. A multitude of items are embraced in the account, but there seem to be only two matters actually in dispute. The pleadings are long and involved and will not be set out at length. Certain building contractors, named Woodward, agreed to construct an apartment house for Messrs. Crane and Rood. After the contract was made, the Colonial Apartment House Company became the owners of the property. The contractors entered into a subcontract with the plaintiff for lumber and material necessary in the construction of the building. The total amount furnished, for which plaintiff claims a lien, was \$2,228.24. The defendants insist that they are entitled to two credits upon this account, which are the matters in dispute.

A credit of \$750 was claimed by reason of the following circumstances. On January 15, 1910, there was due on the apartment building, according to the architect's estimates, \$750. On that day Mr. Woodward applied to Mr. Crane, who was acting for the Colonial company, for this money. They figured up the various amounts due subcontractors and laborers, and found that \$400 was due plaintiff for material furnished, and \$350 to several specified laborers and materialmen. Mr. Crane then said he would write checks to the various creditors for the amounts due them, respectively, but Woodward suggested that the check be given to him, and he would pay the money to each of these parties himself. Woodward deposited Mr. Crane's check in his bank to the account of his firm, and wrote out checks in order to dispose of the \$750 which had been entrusted to him for that purpose. Woodward and the plaintiff had had numerous dealings prior to the building of the Colonial apartment house, and Woodward was indebted to plaintiff for material supplied before this time for other buildings. It was Woodward's custom to procure estimates from time to time as work progressed on

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these buildings, and to pay to plaintiff its proper proportion of the money received upon these estimates. Some months prior to January 15, Woodward had given two undated checks to plaintiff for material furnished in other buildings, one check being for \$670. These checks were given with reference to material furnished upon other jobs, and were accepted by plaintiff with the agreement and understanding that Woodward would notify plaintiff when he received the architect's estimate and the money due upon the respective jobs, and would let the plaintiff know when it might cash these checks. After the talk with Crane, at which he had received the \$400 to apply on the claim of plaintiff against defendant, Woodward called Mr. Van Kuran on the telephone, and told him he had some money for him. Van Kuran then, without further inquiry and without notification or permission from Woodward, filled in the date of "November 30, 1909," upon the undated check for \$670, immediately presented it to the bank for payment, and thereby withdrew \$670 of the \$750 which had been given to Woodward by Crane to pay the specific amounts and parties named, including \$400 to plaintiff. Before the check was cashed, Woodward's account was overdrawn \$107.46, and by the payment of the \$670 check the account was again overdrawn \$27.46. The \$670 thus obtained was applied by the plaintiff upon prior debts of Woodward for material used on other buildings, and no credit was given the Colonial company for any amount. The check was given to Woodward on Saturday, January 15, after banking hours. On Monday, January 17, before banking hours, Mr. Crane called up Mr. Van Kuran, and asked him if he had received the \$400 that was sent to him on Saturday. Van Kuran told him he had, but when Crane asked for a receipt Van Kuran said he did not think a receipt was necessary, and told Crane "to fix it up with Woodward." Crane also testified that Woodward agreed to bring the receipt on Monday morning for the several amounts which were included in the \$750 check. Crane testifies that afterward he had a conversation with Mr.

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Boyer, in which he insisted upon receiving credit for the \$670, but that Boyer said that Woodward had several accounts, and they had applied it.

The district court found upon this branch of the case in favor of defendants, and held they were entitled to credit for the amount withdrawn from the bank with interest. Plaintiff insists this was erroneous. It is said that Woodward was not a trustee, and that, therefore, plaintiff had the right to apply the money on whichever account of Woodward's it pleased. We are of the opinion that the money did not belong to Woodward, but that it was entrusted to him for a specific purpose, and that it was deposited by him for that purpose. Woodward was merely a messenger or bailee entrusted with the check for the purpose of paying the money represented thereby to the plaintiff and to the other parties named, in the specific amounts agreed upon, and for bringing back to Mr. Crane a receipt from each of the creditors for such specific amounts. The plaintiff was not authorized by Woodward to withdraw these funds from the bank, and had no right, under the previous agreement with Woodward whereby the undated checks were to be paid from the estimates upon the jobs for which the material was furnished, to fill in the date and present the check for payment at the bank at the time it did so. The plaintiff by this unauthorized act of withdrawal, and by refusing to credit the Colonial company with this money, wrongfully converted to its own use the \$670 drawn from the bank. Under well-settled principles of law, it would have been liable to an action for money had and received, and it is equally bound to allow the owner of the fund credit upon its indebtedness to that extent.

It is urged that there was no consideration passing between Woodward and Crane, and therefore no trust relation was created. Even if Woodward were only a gratuitous bailee entrusted with the check for a specific purpose, this would not alter the conditions. Plaintiff was never authorized to use the undated checks to draw this

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the adoption, paid for making out the papers, intended to sign and offered to sign the petition for adoption while before the court, but that his counsel said it was unnecessary for him to do so. After these proceedings the child was taken to the home in Logan county, and lived in the family until the death of Mary McLaughlin, and to the time of the trial of this case in district court.

In this action brothers and sisters of Mary McLaughlin are claiming the land as her heirs. The guardian *ad litem* of Clarence Brother McLaughlin intervened and filed a petition claiming an interest in the land for him as the adopted son of Mary McLaughlin. He also set up a contract for his adoption and to make him her heir, and asked that, if the court found the adoption proceedings were invalid, such contract should be specifically enforced, and the boy decreed to have the same interest in the property as if he had been the natural heir of Mary McLaughlin. The district court held that the adoption proceedings were void, and that the county court of Custer county was without jurisdiction. It also refused to specifically enforce the alleged contract, and quieted the title of plaintiffs.

The provisions of the code affecting the determination of the questions presented are section 798: "A married man, not lawfully separated from his wife, cannot adopt a minor child without the consent of his wife; nor can a married woman, not thus separated from her husband, without his consent: Provided, the husband or wife, not consenting, is capable of giving such consent." Section 800: "Any person or persons desiring to adopt a minor child shall file in the county court of the county where the person desiring to adopt said child resides a petition stating that he freely and voluntarily adopts said minor child, which petition shall be signed and sworn to by the person so desiring to adopt. Said petition may state the terms and conditions on which said adoption is desired to be made."

The plaintiffs contend that the adoption proceedings are void for the reasons: (1) That no formal consent of

Wilson McLaughlin was given to the adoption of the child by his wife; (2) that Mrs. McLaughlin was not a resident of Custer county.

Appellant urges that the consent of Wilson McLaughlin is sufficiently shown by the record and by facts in evidence; and that the appearance of the adopting parents with all the other interested parties was sufficient to confer jurisdiction upon the county court of Custer county. Appellant also contends that the provision of the statute conferring jurisdiction upon the county court where the person desiring to adopt the child resides is directory only. He argues that, though an ordinary civil action must be brought in the county in which the defendant resides or may be summoned, if he enters a voluntary appearance in an action brought in another county, the court of that county would acquire jurisdiction; and, further, that in any event Mary McLaughlin was at least a temporary resident of Custer county, and this is all that is required. He further has pleaded a full performance on the part of the surrendering parents and the child, of the contract of adoption and to make the child the heir of Mary McLaughlin, and maintains that the collateral heirs may not deny the validity of the adoption proceedings or the right of the child to take as an heir.

An examination of cases in other states shows that there are two classes of decisions upon such questions: One based upon the view that, since statutes of adoption were unknown at common law, the powers conferred upon probate or county courts are of such a limited and special nature that all proceedings must be strictly construed, no presumptions will be indulged in, that nothing can be shown outside of the record to supply omissions therein, and that the statutory requirements must be strictly followed in all respects in order to confer jurisdiction. The other class, while adhering to the view that statutory requirements as to jurisdiction must be complied with, take a more liberal view, and hold that in the exercise of the jurisdiction conferred upon them in adoption proceedings

questions involved, we adopt it as a statement of the facts. The plaintiff, the Monarch Portland Cement Company, manufacturers of cement at Humboldt, Kansas, sued the defendant, P. J. Creedon & Sons, for five cars of cement shipped March 31 to April 8, 1910. The conceded net amount due on these five cars, after proper credits for freight and sacks returned, was the sum of \$480, and was so allowed at the trial. The defendant counterclaimed for damages for breach of a written contract which provided for the purchase of a minimum of 12,500 barrels and a maximum of 25,000 barrels to be delivered between the date of the contract, March 31, 1910, and December 31, 1910. A copy of the contract is attached to the answer, also exhibit 1. The court in its instructions fixed the amount of plaintiff's claim at \$480, and limited defendant's counterclaim to the minimum quantity of 12,500 barrels and damages of \$2,390, and told the jury, if they found for the defendant, the verdict should be for \$1,925, which amount they so found and for which judgment was entered.

The main controversy is over the validity of the contract. It was made for the plaintiff by one Hickey of Omaha, who held a written contract, which is in evidence, and which gave him certain limited powers, and was executed for defendant by W. J. Creedon, an officer of defendant company. Defendant's contenti was that this contract was approved and ratified at Omaha by S. D. Crozier, the sales manager of plaintiff. The plaintiff denies the alleged approval, and the dispute on this point forms the main controverted point in the case. The defendant's contention was that Crozier, the sales manager of plaintiff, was shown the contract, and that, while he declined to sign the blank provided for its approval, he stated to Creedon that it was not necessary, and that the telegraphic order he then and there sent for five cars "would start the contract to going." Plaintiff's claim is that Crozier had no authority to approve it, declined so to do, that he agreed only to submit it, and a week later when he did submit it

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to the executive officers at Humboldt they refused it, and that the ordering of the five cars was to supply an immediate want unconnected with the contract.

The first contention of plaintiff is that the verdict is not sustained by the evidence. In February, 1910, Mr. Hickey, the Nebraska sales agent, Mr. Peters, who was also in the employment of the plaintiff, apparently as a special agent or salesman, and Mr. Crozier, the sales manager of the plaintiff, were together in Omaha, and had some conversation with Mr. Creedon with reference to a purchase of cement by him from the Monarch company. Apparently nothing definite was accomplished at this time, but on or about the 31st of March, 1910, Crozier and Peters went to Omaha and met Mr. Hickey at the office of the Power-Heafy Coal Company. Crozier testifies he went to Omaha on receipt of a telegram, that he consulted Mr. Connet, the president of the company, and decided he ought to go. Crozier and Hickey discussed the matter of a contract with defendant, and Hickey prepared a contract in triplicate and passed it to Mr. Crozier for his examination, who said he did not believe Creedon would sign it, but suggested no changes. Mr. Peters says that at this time Crozier discussed the terms of the contract with Hickey, and that it was partly reduced to writing when he left the room. Later in the day Mr. Hickey telephoned to Creedon, and Creedon went to Hickey's office, where he found Hickey with the contract all drawn up, except the signatures. Hickey then signed it for the Monarch company and Creedon for the defendant. After signing, Hickey took the contract, and they both went from there to the Henshaw hotel at Hickey's suggestion that they go and talk the matter over with Mr. Crozier. They found Crozier and Peters at the hotel. Creedon testified that Hickey produced the contract, and Creedon stated, "Here is the contract with our signatures," and asked him to approve it. Crozier said it was unnecessary for him to sign, and asked for an order for five cars of cement, saying: "We have entered into this contract now and we desire to

start it at once to conform with the terms of the contract. I will wire in an order." Hickey, Creedon and Peters practically agree that Crozier took the contract and asked Creedon how much cement he could take to start the contract; that Creedon authorized the shipment of five cars of 100 barrels each, and that Crozier then wrote a telegram instructing the shipment of five cars. He told Creedon that perhaps the shipment would be invoiced to him at a higher price, but he would be back in Humboldt in a few days, and if it was he would have it fixed. Crozier took two copies and Creedon retained one. The essential part of the written contract is as follows:

"That the party of the first part hereby sells and agrees to ship and the party of the second part purchases and agrees to receive a minimum of 12,500 and a maximum of 25,000 barrels of Monarch Brand Portland Cement, to be shipped the party of the second part at a maximum price of 80 cents per barrel f. o. b. cars at Humboldt, Kan., with the further understanding that, if at any time during the life of this contract Kansas Gas Belt current list price should be lower than the above figure, then during such time as such reduction exists the price on shipments made to the party of the second part during said period shall be reduced to current figure in effect. * * * It is further understood that party of the second part shall begin ordering said cement at once, and that shipments shall be distributed as equally as possible between the months covered in this contract, approximating a minimum of 1,500 and a maximum of 3,000 barrels monthly, with the further understanding that the party of the first part shall not be obliged to ship over 5,000 barrels in any one month. * * * This contract to remain in full force and effect subject to above contingencies from April 1st, A. D., 1910, to December 31st, A. D., 1910. In token of our acceptance hereof, witness our hands this 31st day of March, A. D. 1910, same being affixed by our duly authorized representatives. Monarch Portland Cement Company, by E. G. Hickey, Nebr. Sales Agt. Approved P. J. Creedon & Sons

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by W. J. Creedon, Secy. & Treas. Monarch Portland Cement Company by ———."

The telegram is as follows: "Omaha 3-31-1910. To Monarch Portland Cement Co., Humboldt, Kansas. Ship P. J. Creedon & Sons, Omaha, one car today sure; allow four more hundred barrel cars to follow *via* Mo. Pac. S. D. Crozier."

The first communication received by Creedon from the Monarch company was as follows: "The Monarch Portland Cement Co. Humboldt, Kans., March 31, 1910. Creedon & Sons, Omaha, Nebr. Gentlemen: We have received today a telegram from our Mr. Crozier, to ship you one car Monarch cement today sure, and allow four more 100 barrel cars to follow *via* Missouri Pacific, and we are sending you today one 150 barrel car and will give the rest of the order our prompt attention. Trusting this is satisfactory, we are, Yours very truly, The Monarch Portland Cement Co. S. D. Crozier, Sales Manager."

Defendant received 550 barrels of cement within a few weeks afterward, billed to it at 80 cents a barrel, which was the contract price. On April 26 the Monarch company was directed by letter to ship one car of cement a day on the contract until further notice. On April 28 the Monarch company acknowledged receipt of the order of one car a day, but stated that the price was now \$1 f. o. b. Humboldt, or \$1.10 f. o. b. Iola, Kansas, and refused to ship cement under the contract. Creedon also testified that in May he was told by Mr. Keith, the secretary of the Monarch company, that the contract had not been approved by the company, and cement had advanced, and therefore he would not ship under the contract. Crozier testified that, when the contract was shown to him at the hotel, he told Creedon that plaintiff could not accept it because it did not conform to the original contract with Mr. Hickey, but that he was willing to submit it to Mr. Connet, the president of the company, but was sure it would not be accepted; Creedon said he was out of cement and wanted five cars at once; Hickey and Creedon were trying to write

a telegram, that they showed it to him, and that he re-wrote it, saying at the time that these five cars were to be shipped without having any relation to any contract; that in about a week he took the contract to Humboldt and showed it to Connet, and returned it to Hickey revised in accordance with their contract with Hickey. The president and secretary of the company both testified that, when the five cars were shipped, they did not know of the Creedon contract. Creedon and Hickey both deny specifically that Crozier said the contract would not be accepted because it did not conform to the Hickey contract; that he would submit it to Connet, but that he did not think it would be approved; and that Crozier said the five cars would be shipped without any relation to the contract.

We are convinced from the evidence that Mr. Crozier as sales manager of the Monarch company had power to enter into or to approve and ratify this contract. Why constitute such an officer and at the same time bind him by secret limitations on his authority? In fact, the question of his authority does not seem to be very material, because it appears to be conceded that if Crozier had approved the contract at the meeting his action would have bound the principal, and this was really the main issue in the case. In *Barber v. Stromberg-Carlson Telephone Mfg. Co.*, 81 Neb. 517, we said: "The manager of sales of a manufacturing corporation has power to direct and contract in regard to the usual running business of selling its wares, and persons contracting with such corporation are not bound to know a by-law thereof limiting the power of such manager to make the customary contracts."

We are convinced that Crozier not only had ostensible authority to make or approve this contract, but had actual authority so to do. The real inquiry is whether the evidence is sufficient to sustain the verdict. The jury were amply justified in believing Hickey, Creedon and Peters with respect to the conversation at the hotel as against Crozier, and, when we take into consideration the further fact that Crozier was cognizant of and took part in the

preparation of the written document before Creedon ever saw it, the story of these witnesses seems to be fully corroborated. The fact that the other officers of plaintiff had no knowledge of the specific terms of this contract when the telegram ordering the five cars was received is not essential to its validity. Crozier had authority to ratify the contract, his acceptance of it and direction to ship the goods was a sufficient approval and ratification on the part of the corporation.

The contention is made that the court erred in excluding evidence that new contracts were sent to Hickey about April 8, and that he so informed Creedon. It is said that this was important to go to the jury, especially in view of the fact that it was nearly a month after the meeting at the hotel before Creedon ordered any more cement. The only possible effect this evidence could have would be to show that, when the terms of the contract were brought to the attention of the other officers of the plaintiff company, they did not approve them and desired to change them. This had already been testified to directly, could throw no light upon what actually occurred at the hotel, and was immaterial.

The case is not one, as suggested by the plaintiff, where one party to a proffered contract, required by the statute of frauds to be in writing, can make that contract binding by his own verbal testimony to its acceptance; but, as we view the testimony, it is one where a written contract was prepared and signed by a local sales agent under the authority and by the direction of the general sales manager of a corporation, and by the purchaser, and when presented to the sales manager for approval was ratified by him, by accepting the contract, ordering from his principal and delivering goods under its terms.

We find no prejudicial error in the record, and the judgment of the district court is

AFFIRMED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

ANNA J. WILSON, APPELLANT, v. L. AUGUSTUS WILSON,
APPELLEE.

FILED JUNE 26, 1913. No. 17,851.

1. **Appeal: ASSIGNMENTS OF ERROR.** The judgments of the district courts of this state are presumed to be correct, and counsel assailing the correctness of the same must assume the burden of pointing out specifically the rulings of which they complain and the mistake made by the trial court.
2. ———: **IMMATERIAL EVIDENCE.** A case tried to the court without the intervention of a jury will not be reversed on account of the introduction of immaterial testimony, if there is sufficient competent and material evidence in the record to sustain the judgment.

APPEAL from the district court for Gosper county:
ERNEST B. PERRY, JUDGE. *Affirmed.*

Lafe Burnett and R. D. Stearns, for appellant.

Ritchie & Wolff and O. E. Bozarth, contra.

LETTON, J.

This is a second appeal by a ward from a settlement of her estate made by her guardian. The former opinion may be found in 90 Neb. 353, 361. A large number of complaints seem to be made in the brief with reference to different items in the accounting, but the objections are not pointed out specifically enough, except in a few instances. We find, however, a number of assignments of error which will be considered separately.

1. It is complained that the court erred in overruling the ward's motion for reasonable attorney's fees and expenses, and it is said that, where litigation is caused by the guardian's neglect, he is liable for the costs of litigation, as well as attorney's fees. The abstract shows that the ward's motion to be allowed expenses incurred in the case to the amount of \$215.19 was sustained to the amount

of \$90.67, and that \$100 attorney's fees was allowed "for this trial." There has been no affirmative showing made that these allowances were insufficient, nor has any evidence been pointed out to convince us that such is the fact.

2. It is next assigned that "the court erred in permitting defendant to encumber the record with immaterial matter over the objection of plaintiff." We have repeatedly held that the introduction of immaterial testimony in a case tried to the court is not prejudicial error, if there is sufficient competent and material evidence in the record to sustain the judgment. Of course, if a party introduces a mass of testimony on the statement that it is material, and the trial court finds it has no bearing upon the issues, there is no doubt that the costs so made would, on seasonable application being made, be taxed to the party thus needlessly encumbering the record. This does not appear to have been done.

3. That the court erred in its rulings on objections interposed by defendant by excluding questions asked the witness Lewis, who was the judge of the county court, as to his reasons for including the dower of \$500 in the judgment. The reasons of the court were entirely immaterial and could throw no possible light upon the issues in the case. The evidence was properly excluded.

4. That the court erred "in allowing the defendant to deny his own sworn report, pages 258 to 260, inclusive." We find no testimony in the record at the pages named to which this assignment is applicable. To attempt to search through hundreds of pages of a lengthy and confused bill of exceptions to ascertain what testimony is applicable to this assignment is too much of an imposition upon the court, and in the crowded condition of our docket is too unfair to other litigants to justify the effort. Where a multitude of items are involved, as in this case, it is the duty of counsel to point out specifically the particular pages of the abstract, in a case where abstracts are used, or of the bill of exceptions in cases without abstracts,

where the evidence or ruling justifying the contention is to be found.

5. These are the only specific assignments of error made. A large number of items are complained of in the brief of appellant, but the particular errors of which complaint is made are not clearly pointed out. Explanations as to many of these items are made in the brief of appellee, and others seem, so far as we can see, to have been decided properly by the district court. The presumption is that the trial court on the second hearing followed the principles laid down by this court in the former opinion. It has not been affirmatively shown that it has not done so. It would take an expert accountant to bring order out of the chaos presented by this record and abstract, and the court must decline a task for which it is in no way fitted. If a litigant desires such a case as this reviewed as to each item, the matters complained of must be clearly and specifically pointed out, and the fact that the trial court made a mistake made apparent. This has not been done.

We find no reason to disturb the findings of the district court, and its judgment is therefore

AFFIRMED.

ROSE, FAWCETT and HAMER, JJ., not sitting.

**WILLIAM E. WALLACE, APPELLEE, v. A. W. COX ET AL.,
APPELLANTS.**

FILED JUNE 26, 1913. No. 17,063.

1. Replevin: RETURN OF PROPERTY: REFUSAL TO ACCEPT. More delay during three winter months in complying with a judgment requiring the return of a replevied threshing outfit held not to justify the owner's refusal to accept it when returned.
2. ———: ———: ———. Where a defendant in replevin, after a judgment has been rendered in his favor for a return of the replevied property, refuses to accept it on the sole ground that

it was damaged while unlawfully detained, his refusal cannot afterward be justified because the return was delayed for three months.

3. ———: ———: ———: **DETERIORATION.** Deterioration in the value of replevied property, while it is unlawfully detained, does not alone justify the owner in refusing to accept it, when returned in due time pursuant to a judgment in replevin, damages to the property after the rendition of such a judgment being recoverable in an action on the replevin bond. *Wallace v. Cox*, 92 Neb. 354, overruled on rehearing.

REHEARING of case reported in 92 Neb. 354. *Former judgment vacated, and judgment of district court reversed.*

ROSE, J.

This is an action on a replevin bond. Property, consisting of a threshing-machine, a traction-engine, and the appliances belonging to a threshing outfit, had been taken from the obligee under a writ of replevin. There was entered in his favor in the replevin suit a judgment for a return of the property, or for its value in the sum of \$2,000 in case a return could not be had, for damages in the sum of \$404.50 by reason of the wrongful taking and use of the property, and for costs in the sum of \$121.60. The replevin bond bound obligors as follows: "Plaintiff shall duly prosecute his action aforesaid and pay all costs and damages which may be awarded against him, and return the property to the defendant in case judgment for a return of such property be awarded against him." Obligee, who is plaintiff herein, pleads the judgment in replevin, nonpayment of the damages, and failure to return the property to him "in the same, or substantially the same, condition in which it was taken," and prays judgment for \$2,526.10, the sum of the three items named. Obligors are defendants herein, and admit the judgment in replevin, but plead a subsequent return of the replevied property. From a judgment in favor of plaintiff on the replevin bond for the full amount of his claim with interest, defendants have appealed.

Upon a consideration of the appeal at a former term, plaintiff was required to remit, as a condition of affirmance, \$404.50, the amount allowed by the jury in the replevin suit as damages for the wrongful taking and use of the replevied property. *Wallace v. Cox*, 92 Neb. 354. Later a rehearing was granted on motion of defendants and the case has been reargued. In the former opinion two reasons for the conclusion reached on appeal are given: (1) The threshing outfit was not returned within a reasonable time after the judgment in replevin directed its return. (2) The property was diminished in value while it was wrongfully detained, and for that reason the owner properly declined to accept it.

1. Further reflection makes it necessary to recede from the position that the property was not returned within a reasonable time. The judgment ordering a return of the property was rendered December 1, 1909, and the property was returned February 25, 1910. It requires more than mere lapse of time for a short period to show that the delay was unreasonable. The right to appeal from the judgment in replevin did not expire for six months. To comply with the judgment by an immediate return of the property would terminate that right. After a return had been adjudged, the threshing outfit was not retained during a threshing season. An earlier return was prevented by the bad condition of the roads. Plaintiff, in making his own case, testified positively that he refused to accept the property because, "when offered back," it was not "in the same, or substantially the same, condition" as when taken. The delay in making the return had nothing to do with plaintiff's refusal to accept the returned property. For these reasons, the first position assumed in the former opinion will be abandoned.

2. Was deterioration during the time the property was wrongfully detained a sufficient justification for the refusal to accept it in a damaged condition? While there was some controversy, not material to this inquiry, over the identity and condition of an appliance, the identical

thresher and engine taken under the writ were in fact returned. Plaintiff's own testimony shows that they were then worth at least \$1,000, though the jury in the replevin suit had found the value when taken to be \$2,000. Witnesses for defendants said the property, when returned, was in as good condition as when received. In the former opinion cases were cited to show that the returned property, under the facts of this case, was properly rejected. Each of those cases has been re-examined, with the following result:

In *Pittsburgh Nat. Bank of Commerce v. Hall*, 107 Pa. St. 583, the following language was approved: "It would be anything but an act of justice to permit a person who has wrongfully deprived another of his goods, and retained them in his possession until they were nearly destroyed by time and use, afterwards, when judgment was rendered against him for his wrongful act, to save a forfeiture of the bond by an offer to return the article in its depreciated condition. Nor can the sureties be placed in any better condition than the principal." This is a holding that the return of property which has been practically destroyed does not satisfy the bond, but it is not a holding that identical property taken, when of great value, may be rejected, if promptly returned.

In *Fair v. Citizens State Bank*, 69 Kan. 353, it was held that one who replevied a promissory note and permitted it to outlaw while in his hands could not satisfy a judgment for its return by subsequently tendering it back, the rule announced being: "Where, as a compliance with the alternative judgment in an action of replevin providing for a return of the specific property or the value thereof, the property returned has depreciated in value, an action may be maintained to recover such depreciation. The statute contemplates that the property be returned in substantially the same condition, and of the same value, as when taken." The return of an outlawed note was not in law a return of the collectible note received.

In *Parker v. Simonds*, 8 Met. (Mass.) 205, the replevied

property was never returned, and in a suit on the replevin bond plaintiff was allowed to recover its value.

In *Berry v. Hoeffner*, 56 Me. 170, the replevied property was accepted when returned. The point discussed was: "The question presented is whether a return of the goods replevied, *not* 'in like good order and condition as when taken,' is a sufficient compliance with and performance of the condition of the replevin bond?" While the bondsmen were liable according to their obligation to return the property in as good condition as when taken, the question of the right to reject the property because it was not returned in that condition was not decided.

In *Capital Lumbering Co. v. Learned*, 36 Or. 544, the suit was brought to recover the value of replevied property never returned.

Childs v. Wilkinson, 15 Tex. Civ. App. 687, was determined under a statute providing: "If the property tendered back by the defendant has been injured or damaged while in his possession under such bond, the sheriff or constable to whom the same is tendered shall not receive the same, unless the defendant at the same time tenders a reasonable amount for such injury or damage, to be judged of by such sheriff or constable."

In *Douglass v. Douglass*, 21 Wall. (U. S.) 98, the report shows: As authorized by a statute of Maryland, defendant, who lost possession of chattels under a writ of replevin, retook them by giving a bond. After a judgment had been rendered against him the goods were delivered to the sheriff under a writ *de retorno habendo*. This was held to satisfy the bond for a return of the chattels, though they were not in as good condition as when the bond was given. It was further held that redress for injury to the property in the meantime should be sought in a separate action.

In harmony with those cases it was said in *Eickhoff v. Eikenbary*, 52 Neb. 332: "In order to satisfy a judgment for the return of property the identical property must be tendered in substantially the condition in which it was received."

While the cases cited are precedents for holding that the return of damaged property does not satisfy the replevin bond or the judgment in replevin, they do not contain an announcement of the doctrine that the identical property replevied, when of great value, may be rejected on the sole ground of deterioration. The contrary doctrine is supported by both reason and authority. The principal questions litigated in replevin are the ownership and the right of possession of specific chattels. The adjudication of those questions is not a matter which either party may lightly disregard. It is not optional with a successful defendant in replevin to accept in money the value fixed by the jury in lieu of the property. The judgment is in the alternative. The purpose of fixing the value is to afford a measure of relief, where the property is not, or cannot be, returned. Injury to replevied property while wrongfully detained and failure of the defendant to comply with a judgment in replevin are protected by the replevin bond. Under the code of this state the law is:

"The successful party to an action of replevin should recover therein all damage which he has actually sustained by reason of the unlawful detention of the property in controversy.

"A defendant who has in an action of replevin recovered judgment for the return of the property and his damage for the wrongful detention thereof cannot thereafter maintain an action against the plaintiff for damage on account of depreciation in the value of such property while in possession of the latter." *Teel v. Miles*, 51 Neb. 542.

Damages to property after the rendition of a judgment for its return are recoverable in an action on the replevin bond. A text-writer on Replevin says: "If the property has in fact been injured while in the plaintiff's possession, that fact will not absolve the defendant from the duty of receiving it in its damaged condition. The judgment for a return does not leave it at the option of the defendant to accept or refuse and demand the value. The depreciation is, however, to be made good, and the party may receive

full indemnity by suit on the bond." Wells, Replevin (2d ed.) sec. 422.

Another author states the law as follows: "Whichever party recovers a judgment for a delivery or return of the property, in replevin, when the same is in the possession of the adversary, is bound to accept the return of it, or the return of a substantial part of it. In case of the tender of a part of it, such tender of return should be accompanied by a tender of the money value of the remainder in satisfaction of the judgment for a return or for a payment of the value in case a return cannot be had. The party has a right to deliver or return what he can, and pay for that which he cannot deliver. This is true, if the part offered to be returned is separable from the others and in no way dependent upon it for use or value, and the part tendered is in the same condition as when taken." Shinn, Replevin, sec. 679, citing *Reavis v. Horner*, 11 Neb. 479. The views thus expressed seem to be justified by both reason and authority. *Leeper, Graves & Co. v. First Nat. Bank*, 26 Okla. 707, 29 L. R. A. n. s. 747; *Paulson v. Nichols & Shepard Co.*, 8 N. Dak. 606; *Pabst's Brewing Co. v. Rapid Safety Filter Co.*, 54 Misc. Rep. (N. Y.) 305; *Allen v. Fox*, 51 N. Y. 562; *Pickett v. Bridges*, 10 Humph. (Tenn.) 171; *Washington Ice Co. v. Webster*, 125 U. S. 426.

In the present case, the conclusion is that plaintiff's refusal to accept the property when returned was not justified by the evidence nor sanctioned by the law. The opinion to the contrary is therefore overruled. It necessarily follows that the former conditional affirmance is vacated, the judgment of the district court reversed and the cause remanded for further proceedings.

REVERSED.

REESE, C. J., LETTON and HAMER, JJ., dissent upon the ground and reasoning contained in the former opinion.

JOHN C. SPRECHER, APPELLEE, v. ENGELBERT F. FOLDA
ET AL., APPELLANTS.

FILED JUNE 26, 1913. No. 17,170.

1. **Mortgages: DEED AS MORTGAGE: ELECTION: EVIDENCE.** Where a grantee in possession of realty under a mortgage in the form of a warranty deed seeks to defeat the grantor's equity of redemption by a parol settlement or by an oral election to treat the conveyance as an absolute deed instead of a mortgage, such facts must be clearly established by a preponderance of the evidence.
2. **Appeal: EQUITY: CONFLICTING EVIDENCE.** In an accounting in equity where, upon an issue of fact, the proof consisted largely of oral testimony which is in irreconcilable conflict, the findings of the district court thereon are entitled to be considered by the appellate court in determining the question of the sufficiency of the evidence to sustain the judgment.

APPEAL from the district court for Colfax county: CONRAD HOLLENBECK, JUDGE. *Affirmed.*

George W. Wertz and Edgar M. Morsman, Jr., for appellants.

John J. Sullivan and John C. Sprecher, contra.

ROSE, J.

This is a suit in equity to adjudge a deed to the south 88 feet of lots 13, 14 and 15, block 80, in Schuyler, to be a mortgage, to determine by an accounting the amount due defendants from plaintiff, to permit him to redeem the lots from the lien thus created, and to restore the legal title to him upon the payment of his indebtedness. The Banking House of F. Folda, defendant, is a corporation engaged in the banking business at Schuyler, and defendant Folda is its cashier, manager and principal stockholder. In the petition the following summarized facts are pleaded in detail: Plaintiff owed defendant \$11,500 on a promissory note dated July 10, 1901, due in five years,

and bearing interest at the rate of 7 per cent. per annum. Being engaged in improving his lots, when the note was executed, he arranged with defendants to furnish him money as needed, not exceeding \$8,500, in addition to the note described, with the understanding that they should collect from tenants rents amounting to \$190 a month and apply them on his indebtedness. Pursuant to that arrangement defendants furnished him at various times between \$1,500 and \$2,000. Since July 12, 1901, they have collected the rents, but have failed to render a statement showing the amounts received by them or the balance of his indebtedness. Plaintiff does not know the amount of such balance, but alleges it does not exceed \$12,500.

Some of the facts pleaded in the answer may be briefly stated as follows: In addition to the note for \$11,500, dated July 10, 1901, plaintiff was then indebted to defendants in the sum of \$3,000 on a note dated December 15, 1899, and bearing interest from July 10, 1901, at the rate of 8 per cent. per annum. On the latter date plaintiff and wife, by warranty deed recorded the same day, conveyed the premises to Folda, who entered into a written agreement to sell the property to plaintiff for \$14,500. Pursuant to the contract of sale, plaintiff, by payment of various sums, had reduced the note for \$11,500 to \$9,900 December 4, 1902. In addition to the two notes described, defendants advanced to plaintiff from March 1, 1902, various sums, aggregating with interest \$2,356.65. Plaintiff owed defendants December 4, 1902, \$15,600, composed of the following items: Balance due on the note for \$11,500, \$9,900; note dated December 15, 1899, \$3,000, and interest thereon, \$343.35; other loans \$2,356.65. December 4, 1902, plaintiff took up the note for \$11,500, and executed another note in favor of Folda for \$12,600, bearing interest at the rate of 7 per cent. per annum and payable December 31, 1902, on which interest was paid monthly in the sum of \$73.50 until July, 1904, when payments ceased. Plaintiff and wife verbally agreed with defendants, on or about July 1, 1904, that the contract of sale should be

canceled and that plaintiff should abandon all claims to the realty; defendants agreeing to release him from all of his obligations and indebtedness to them, to pay the taxes for 1903, and to release his home from the lien of a mortgage which had been given to secure his note for \$3,000. The obligations thus assumed were performed by defendants, and they took possession of the premises as owners August 15, 1904; plaintiff acquiescing and making no objection until sometime prior to May 8, 1910. Defendants sold the south 88 feet of lots 13 and 14 to a lodge of the Odd Fellows, and transferred the title and possession to the purchaser October 4, 1904. The purchaser has been in possession as owner ever since, and has improved the building on the premises at an expense of \$8,000. Plaintiff had full knowledge of the facts pleaded in the answer, remained silent for more than five years, asserted no right to the premises, nor made any claim against defendants in the meantime, but frequently asserted to Folda and others that he had sold the lots and had no interest therein. By reason of his conduct and silence he is estopped to assert any claim to the premises or to demand from defendants an accounting.

In a reply plaintiff alleged that the note for \$3,000 had been merged in the note for \$11,500, and denied any indebtedness beyond that pleaded in his petition. Such facts as were not stated in the petition or admitted in the reply were denied.

Upon a trial of the issues, the district court upheld the sale of the south 88 feet of lots 13 and 14 to the Odd Fellows, credited the purchase price of \$12,000 on the indebtedness of plaintiff to defendants, found the balance due them to be \$3,661.52, and permitted him to redeem the south 88 feet of lot 15 upon the payment of that sum. Defendants have appealed.

It is asserted that the decree is erroneous for the reason that plaintiff by an oral election abandoned and lost his right to redeem the premises. In this connection defendants invoke the rule that, where grantee is in possession of

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realty under a mortgage in the form of a warranty deed, the grantor's equity of redemption may be defeated by a parol settlement or by an oral election to treat the conveyance as an absolute deed instead of a mortgage. *Stall v. Jones*, 47 Neb. 706. The loss of the right to redeem under such circumstances, however, depends upon the proof of the settlement or of an election to treat the deed as an absolute conveyance. In the present case it is conceded that the right of redemption existed under a deed absolute in form. Plaintiff admitted that he offered to allow Folda to retain the fee upon cancelation of all of his indebtedness to defendants, not exceeding \$12,500, and upon the payment of about \$7,000 to other creditors, and testified that the property was worth \$20,000. He also testified that Folda agreed to these terms, but failed to keep his agreement and did not pay the other creditors. In his relations with plaintiff Folda was more than a mere mortgagee. He had lived in plaintiff's family. He became a brother-in-law of plaintiff. He was a trusted adviser, looked after many of his financial and business transactions, collected his rents and applied them on his debts, and kept accounts of transactions between them. Where a verbal election to abandon the right to redeem is invoked by the lienor under such circumstances, the evidence should be more convincing than that upon which defendant relies. When all of the conditions are considered, there should not be a finding that plaintiff abandoned his right to redeem or that the parties executed an oral agreement to that effect.

In regard to the accounting, the controverted issue between the parties may be stated in this form: Was the indebtedness of \$3,000 included in the later note for \$11,500? The question is not easy to answer. The evidence is conflicting. Though there are two abstracts, the entire bill of exceptions has been read and considered. Accounts were kept under the direction of Folda, and they corroborate his testimony that the note for \$3,000 was not included in the larger one. Plaintiff trusted Folda and did not

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keep an account of their transactions. Their business relations extended over a number of years. Plaintiff, however, kept an account at Folda's bank, and in a few instances checks were drawn against it at the direction of Folda without plaintiff's knowledge. Plaintiff was financially embarrassed and could not direct his affairs independently of Folda. Both plaintiff and his wife testified that the indebtedness of \$3,000 had been reduced by payments, but they could not give the amounts nor dates. They testified positively that Folda had said, before the larger note was executed, that it included plaintiff's entire indebtedness to defendants, and that he agreed to release the mortgage on their home. Plaintiff testified that afterward Folda did not claim that the item in dispute was unpaid nor make any demand for the interest thereon. Some minor circumstances tend to corroborate plaintiff. While there is some doubt about the correctness of the finding of the trial court, it is not more certain that the evidence as a whole requires a different conclusion.

AFFIRMED.

BARNES, SEDGWICK and HAMER, JJ., not sitting.

PAXTON IRRIGATION DISTRICT, APPELLEE, v. JOHN H. CONWAY ET AL., APPELLEES; HOWARD MILES ET AL., APPELLANTS.

FILED JUNE 26, 1913. No. 17, 196.

- 1. Equity: JURISDICTION: MULTIPLICITY OF SUITS.** To prevent a multiplicity of suits against an irrigation district, a court of equity may acquire jurisdiction to cancel void district bonds in the hands of many different holders.
- 2. Waters: IRRIGATION DISTRICT BONDS: CANCELATION.** Void bonds illegally issued by officers of an irrigation district to pay for excavating a canal may be canceled without requiring the district to pay the holders of the bonds the reasonable value of services

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performed, where the contract for such work was made in violation of statute, and resulted in no benefit to the district.

3. ———: ———: ———: **VALIDITY.** Bonds of an irrigation district are void, if issued in violation of mandatory legislation that they shall be signed by the secretary of the district, that the seal of the district shall be attached, that they shall be paid in installments maturing at different times, that they shall be numbered consecutively as issued, and that they shall bear date from the time of their issuance.
4. ———: ———: ———: **RATIFICATION.** An irrigation district, by paying interest on void bonds with taxes levied for that purpose, does not thereby ratify the bonds or estop itself from assailing them as illegal.
5. ———: ———: ———. In a statutory proceeding, an order confirming the preliminary steps leading up to the execution of bonds of an irrigation district does not affect a subsequent, unlawful negotiation or transfer of the bonds.
6. ———: ———: ———: **BONA FIDE PURCHASERS.** A person who negotiates for the purchase of bonds executed by an irrigation district and enters into a contract to excavate a canal in exchange for such bonds is required to take notice of the statutes governing the district and of the limitations of its officers.

APPEAL from the district court for Keith county: **HANSON M. GRIMES, JUDGE.** *Affirmed.*

Wilcox & Halligan, A. Muldoon and L. E. Roach, for appellants.

Hoagland & Hoagland and J. G. Beeler, contra.

ROSE, J.

Plaintiff was organized in 1895 as an irrigation district to make a canal from the South Platte river through the lands of the organizers in Lincoln and Keith counties for the purpose of irrigation. To that end some work was done, but the project was a failure. The canal was never completed nor used to carry water for irrigation. When water was needed, the river was generally dry at the point of diversion. Bonds in the sum of \$100 each were executed by the district July 1, 1896, to the extent of \$27,000.

At an election held July 11, 1905, the electors of the district determined to dissolve the organization. Afterward the district property was appraised at \$111. Creditors were notified by publication to assert their claims. As a result, demands were made as follows: Warrants and other claims, composed of 27 items, including \$13 earned by F. G. Hoxie as appraiser, \$1,138.23; judgment in favor of Diana Hawley, \$102.83; irrigation bonds in the hands of 11 holders, \$6,300. The claimants are defendants. The suit is one in equity to cancel the bonds, the warrants and other evidences of indebtedness as being illegal and void, and to enjoin the enforcement of all claims against the district. Upon a trial of the cause the court below allowed the claim of the appraiser and of the judgment creditor, held that the bonds, the warrants and other claims were illegal and void, canceled them, and enjoined defendants from attempting to collect them from plaintiff. Three defendants only appeal, claiming to be innocent holders of the bonds. They are the First National Bank of North Platte, Daniel Schurtz, and Howard Miles.

A reversal is demanded on the ground that plaintiff had an adequate remedy at law, which defeated jurisdiction in equity to cancel the negotiable bonds held by appellants. The decision is not controlled by the rule invoked. Plaintiff is a public corporation and is seeking by lawful means to end an unprofitable existence. Many of the bonds have never passed out of the hands of the officers of the district. If they are negotiable, they ought to be destroyed when the district is dissolved. Taxes levied against the lands in the district will be affected by the cancelation of the bonds. Bonds said to be void are in the possession of different holders. Warrants and claims for excavating were in some instances exchanged for bonds. It is alleged that contracts for work on the canal were void, and that bonds were accepted in payment for such work. These are conditions under which equity will take jurisdiction to prevent a multiplicity of suits.

The next point argued is that plaintiff, in any event,

should have been required to do equity by paying the reasonable value of the work done by the persons to whom bonds had been delivered. The adverse view of the trial court is justified on several grounds. The reasonable value of such work was not pleaded. An offer by Miles to do excavating for bonds was accepted. This method of incurring an indebtedness was not then authorized by the irrigation law. Miles was an officer of the district, and his contract violated the statute, providing that no officer shall be interested in a contract awarded by the board; that the amount of money necessary for construction work shall be estimated in advance; that the cost of construction shall be paid wholly out of the construction fund; that the board shall have no power to incur an indebtedness in excess of express statutory provisions. Laws 1895, ch. 70. The bonds themselves made direct reference to the statute containing these provisions. Contractors and purchasers were charged with notice of the terms of the law and with the records which the board was required to keep. It is undisputed that the irrigation district received no benefit from the contracts they made. It was unable to sell the bonds in the manner provided by law, and could not raise the money to complete the unused canal. The district's property was appraised at \$111, and the appraisal included the value of a grader. On such a record, it cannot be said that the trial court erred in canceling the bonds, if they were void, without allowing the holders to recover the reasonable value of excavating.

Were the bonds void? Plaintiff insists they were issued in violation of the statutory provisions that they shall be "signed by the president and secretary," and that "the seal of the district shall be attached thereto." Laws 1895, ch. 70, sec. 13. The bonds purport on their face to have been executed July 1, 1896. The trial court properly found from the evidence that Elmer P. Mason was secretary at that time, and that he continued to be such until February 20, 1907. The bonds do not bear his name as secretary, but purport to have been signed by "B. M.

Gilbert" as secretary. In this respect they did not therefore comply with the statute.

There was also a finding below that no seal had been provided for the district, and that the one used was unauthorized. This finding is not disproved by the record. An original bond was submitted to the trial court, while the bill of exceptions contains a copy only, which does not bear the impression of a seal.

The notice and call for the special election at which the bonds were voted proposed the issuance of bonds to mature in 20 years, though the statute required their payment in instalments maturing at different times, beginning in 11 years. Laws 1895, ch. 70, sec. 13.

Ratification of the bonds by levying and collecting taxes and by paying interest is urged as an objection to the injunction. Taxes were levied in compliance with a peremptory mandamus previously issued by the trial judge who presided in the present case. The validity of the bonds, however, was not decided on the application for the writ, and it is a well-settled rule that a public corporation, by paying interest on void bonds, does not ratify them or estop itself from assailing them.

Appellants also resisted the injunction on the ground that plaintiff is concluded by a former order in which the district court confirmed the proceedings leading up to the execution of the bonds. The order invoked confirmed the proceedings as regular. It was made by the judge who presided in the present case. A proceeding to confirm the preliminary steps before the bonds are negotiated is authorized by the irrigation law. The order, however, did not affect the sale and delivery of the bonds. At the time they were delivered the statute did not authorize the district to dispose of them in the manner in which they were procured by appellants, but provided: "The board of directors, or other officers of the district, shall have no power to incur any debt or liability whatever, either by issuing bonds or otherwise, in excess of the express provisions of this act, and any debt or liability incurred in excess of such

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express provisions shall be and remain absolutely void." In acquiring the bonds appellants were bound by this statute, and were required to respect the limitations of the officers of the irrigation district.

The record does not show that appellants were innocent holders. Miles had been an officer, and knew the circumstances under which the bonds were voted, negotiated and transferred. Schurtz acquired bonds in the sum of \$500 for services which he admits did not exceed \$150 in value. He received them under circumstances which should have put him upon inquiry. The First National Bank transacted its business in Lincoln county, and was not only required to know the provisions of the statute, but was charged with notice of the public records which the officers of the irrigation district kept.

The findings of the court below are justified by the evidence. No error has been found, and the judgment is

AFFIRMED.

**JOHN H. HARTE, APPELLEE, v. GUSTAVE E. SHUKERT,
APPELLANT.**

FILED JUNE 26, 1913. No. 17,282.

1. **Landlord and Tenant: LEASE: FORFEITURE: ESTOPPEL.** A landlord who, for several months, failed to exercise an option to declare the forfeiture of a long-term lease for nonpayment of past-due monthly rentals, while the tenant, with the knowledge and consent of the landlord, was making permanent improvements under his lease at a vast expense, may be estopped to exercise such option after the improvements have been completed.
2. **Mechanics' Liens: MERGER OF LEASEHOLD IN FEE.** Though a mechanic's lien, when filed, attached only to a leasehold estate, it may be enforced against the fee also after the leasehold has been merged therein by the acts of the landlord.
3. —: **INDEBTEDNESS: INSURANCE PREMIUMS.** The statute creating the right to a mechanic's lien does not authorize a lien for premiums paid by a contractor for liability insurance.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Affirmed as modified.*

W. H. Herdman and Martin Langdon, for appellant.

M. L. Learned and Carl E. Herring, contra.

ROSE, J.

This is an action to foreclose a mechanic's lien for \$15,113.08 on a lot in Omaha. Under a contract for improvements, Harte, the plaintiff, earned \$42,628.19 between November 6, 1907, and June 26, 1909. He received \$27,515.11. The lien is for the remainder.

When Harte commenced work there was on the lot a two-story brick building occupied by the owner, Gustave E. Shukert, and his tenants. The contract for the improvements was made by Harte and Tolf Hanson, the latter having leased the premises from Shukert, May 20, 1907, for a term of ten years, beginning April 1, 1908, the agreed rental being \$102,000, payable monthly in advance at the rate of \$850 a month from April 1, 1908. Under the terms of the demise, failure to pay any part of the rent when due gave Shukert the right, at his option, to declare the lease at an end, and thereby cancel and annul it, to retake immediate possession of the premises, and to remove any person occupying the same. The lease also provided: "All the improvements to said premises made by said lessee shall revert to the owner at the expiration of this lease."

With the consent of the owner and the other occupants, Harte began to make permanent improvements for Hanson as early as November 6, 1907, and continued until sums in excess of \$70,000 had been expended by June 26, 1909, when Hanson became insolvent. He had not paid the rents for May, June and July of that year, but Harte and other creditors paid the May rent July 21, 1909. In the federal court Hanson was adjudged a bankrupt August 3, 1909, and died September 1, 1909. The receiver of the

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bankrupt estate and the trustee in bankruptcy held possession of the demised premises from July 31, 1909, until September 30, 1909, and paid the monthly rentals. Pursuant to a void order of the bankruptcy court, the trustee surrendered the leasehold estate to Shukert, September 30, 1909, and he has been in possession of the premises ever since. Shukert and his wife, his tenants, the trustee in bankruptcy and the administratrix of the estate of the deceased Hanson are defendants herein. The defense of Shukert is that the Harte lien attached only to the leasehold interest of Hanson; that Shukert exercised his option to terminate the lease for nonpayment of rentals due; that the lien expired with the lease; and that the improvements made by Hanson became the property of Shukert. The trial court found that there had been no effective forfeiture of the lease, and that the leasehold estate had been merged in the fee, and rendered a decree of foreclosure in favor of Harte for the full amount of his claim. Shukert has appealed.

The finding that the lease had not been forfeited or terminated for nonpayment of rentals is challenged as erroneous. On the first day of each of the months of May, June and July, 1909, Shukert made a demand for the amount due and unpaid. He asserts that he notified Hanson in writing July 31, 1909, to vacate the premises within three days, and that service was made by leaving the notice at Hanson's usual place of residence. It is argued that the demands and notice mentioned, in connection with the defaults of Hanson, amounted to an exercise of Shukert's option to declare the lease at an end and to retake possession of the premises. By undisputed facts Shukert, on principles of justice and equity, is estopped to assert against Harte the forfeiture of the lease. Harte made the improvements under the direction of Hanson. They were made on a scale so expensive as to indicate that they never would have been undertaken except in contemplation of their use by the lessee during the term fixed by the lease. This was understood by the parties. Shukert knew what

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was being done on the premises by Hanson and Harte, and observed the progress made by them in improving his property. Months before Hanson began to remodel the building, Shukert knew of his tenant's intention to improve it in a manner requiring the outlay of large sums of money. He stood by for more than a year and saw improvements made at the rate of thousands of dollars a month until the aggregate exceeded \$70,000. He knew Harte's connection with the work, and during a portion of the time visited the premises daily. For the entire period covered by these expenditures, no rent was ever paid when due. While the property was being improved, Shukert did not exact payment of the monthly rentals according to the terms of the lease or attempt to exercise his option to cancel it. Had he done so, the situation of Hanson and Harte would have been changed. In that event their improvements and expenses would have been stopped at the end of the first month of the term. Instead of exercising his option, he accepted the rent for each month after the time when it should have been paid and permitted the work of improvement to proceed. He knew of Harte's right to a mechanic's lien. He was charged with notice of the lien when filed. He knew it bound the leasehold estate of Hanson. He waived his right to exercise his option during the time his property was being improved; but, when the work of improvement ceased, he attempted to declare a forfeiture of the lease and to take possession of the improvements as his own property without discharging the lien of Harte. This is not the ordinary case of the forfeiture of a lease for a default in payment of rent, where the tenant makes no improvements, but uses the landlord's property alone. In the present case the right to use permanent and valuable improvements made by the tenant with the consent of the landlord is involved. The distinction is stated in *O'Connor v. Timmermann*, 85 Neb. 422, 24 L. R. A. n. s. 1063. The opinion in that case contains this language: "There is a class of cases holding that one having the right to declare a forfeiture, who does not declare it when he is

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entitled to do so, waives the right, but this rests upon the ground of estoppel. In such cases the lessee has usually incurred large expenditures or made valuable improvements believing that, by the landlord failing to assert the right of forfeiture after breach of condition, it would not be asserted."

In the present case facts creating an estoppel which prevents Shukert from asserting, as against Harte, that the option to declare the lease at an end had been exercised are clearly established by undisputed evidence.

It is further argued that the decree is erroneous because it permits the fee to be sold to satisfy Harte's lien, which attached only to the leasehold of Hanson. There were two estates, the fee and the leasehold. That Shukert owns the fee is unquestioned. After he assumed to forfeit the lease, he took possession of the demised premises and of all the improvements made by Hanson and Harte, and ever since has used both estates as his own property. He remodeled the improved building at a cost of \$15,000, and leased different parts of it to different persons. He has not kept the estates separate, and for the purposes of the lien has merged the leasehold in the fee.

Another argument is directed to the point that an item of \$395.20 for premiums on liability insurance was erroneously included in the decree. A mechanic's lien is a statutory one. The statute does not authorize a lien for liability insurance. Harte, therefore, is not entitled to a lien for this item. The case being here for trial *de novo*, the error will be corrected, but the correction will not be allowed to affect the costs, since it does not appear from the abstract that the objection now made was specifically directed to the attention of the trial court. The item for liability insurance is therefore stricken from the decree, and as thus modified it is affirmed.

AFFIRMED AS MODIFIED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

**STORZ BREWING COMPANY, APPELLEE, v. JOHN SKIRVING,
APPELLANT.**

FILED JUNE 26, 1913. No. 17,320.

Bills and Notes: DEFENSES: GAMING. Record examined, and the case held to be ruled by *Smith v. Columbus State Bank*, 9 Neb. 81.

APPEAL from the district court for Holt county: **JAMES J. HARRINGTON, JUDGE.** *Affirmed.*

L. C. Chapman, for appellant.

Richard S. Horton and J. A. Donohoe, contra.

FAWCETT, J.

From a judgment of the district court for Holt county, in favor of plaintiff, for the sum of two promissory notes, with interest and costs, defendant appeals.

The petition alleges that the notes in suit were executed and delivered by defendant to one Stanton; that before maturity and for a valuable consideration they were sold and delivered by Stanton to plaintiff. The answer admits the execution of the notes, denies all other allegations in the petition, and alleges affirmatively that defendant received no consideration for the execution and delivery of the notes; that Stanton was engaged in the saloon business and in connection therewith conducted a gambling house; that about March 1, 1904, defendant, in Stanton's place, engaged in gambling and lost large sums of money; that the promissory notes sued upon were given to Stanton in settlement of such loss; that there was no other or further consideration for said notes; that by reason thereof the title to the notes did not pass from defendant to Stanton, and that the notes are the individual property at the present time of defendant; that plaintiff has no title whatever in the notes and no standing to maintain an action thereon.

It will be observed that the gambling debt, if such it may

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be termed, was incurred by defendant on or about March 1, 1904, while the notes were not given until the 14th of the next month. There is no provision in our statute making a note, given under such circumstances, void. The wording of the statute is that any person who shall lose any property or money in a gambling house, the wife or guardian of such person, his heirs, legal representatives or creditors, shall have the right to recover the money or the amount thereof, or the property or the value thereof, in a civil action, and may sue all persons participating in the game, and may join the keeper of the gambling house in the same action, "who shall be jointly and severally liable for any money or property lost in any game or through any gambling device of any kind, and no title shall pass to said property or money." Criminal code, sec. 214. This language comes far short of declaring a promissory note, subsequently given to settle a gambling loss, void. That such note would be voidable in the hands of the original payee may be conceded, but the note being negotiable in character, and having been assigned for value before maturity to an innocent purchaser, the rule cannot be extended to such a case. That the plaintiff in this case is a *bona fide* holder for value of the notes is established by the stipulation of the parties upon the trial. The third paragraph of the stipulation reads: "That the plaintiff, before the maturity of said notes, and for a valid consideration, purchased said notes of the payee, A. A. Stanton, without any knowledge or information of the consideration for which they were given, and that plaintiff is an innocent purchaser for value of both of said notes before maturity."

Extended consideration of this case is not necessary. It is ruled by *Smith v. Columbus State Bank*, 9 Neb. 31. Upon the authority of that case, the judgment of the district court is

AFFIRMED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

GEORGE D. FOLLMER, APPELLEE, V. STATE OF NEBRASKA,
APPELLANT.

FILED JUNE 26, 1913. No. 16,931.

1. **Courts: PLEADING: DEMURRER: LAW OF THE CASE.** The ruling of one judge of the district court upon a general demurrer to the petition is not conclusive upon another judge of the same court who afterwards tried the case. If the demurrer is erroneously sustained, the error may be corrected at a subsequent term if the case has not been finally disposed of at the prior term.
2. **Constitutional Law: STATE OFFICERS: EMPLOYMENT OF ATTORNEY.** That part of section 4778, Ann. St. 1911, which authorizes the chief officer of a department or institution to retain and employ a competent attorney in cases of importance or difficulty does not conflict with section 1, art. II of the constitution, and requires such officer to use a reasonable discretion in determining the necessity of such employment.
3. **Statutes: CONSTRUCTION: "CHIEF OFFICER."** The singular number often includes the plural in the construction of statutes, and generally when the manifest intention of the legislature requires it. "Chief officer," as used in section 4778, Ann. St. 1911, is so construed.
4. **Attorney General: ADVISER OF STATE OFFICERS.** The attorney general is the attorney for the state, and the officers who by the constitution and laws are given charge of the affairs of the state may call upon him for advice upon questions of law which arise in the discharge of their duties.
5. **State Board of Educational Lands and Funds: EMPLOYMENT OF ATTORNEY.** There is no chief officer of the board of educational lands and funds within the meaning of section 4778, Ann. St. 1911. The board acts by a majority of its members. The commissioner of public lands and buildings is by the constitution made a member of the board, but the legislature is given power to prescribe by statute the manner of the general management of the business of the board. Many special duties are by statute devolved upon the commissioner of public lands and buildings, but the employment of a competent attorney in special cases relating to the duties of the board is lodged with the board itself.
6. ———: ———: **RATIFICATION.** If the commissioner of public lands and buildings, as a member of the board of educational lands and funds, employs a competent attorney in a case of importance

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and difficulty relating to the department of educational lands and funds, and such attorney, with the knowledge and acquiescence of a majority of the board, renders valuable services which are received and acted upon by the board without objection to the employment of such attorney, and the legislature, after being informed as to the transaction, authorizes suit to be instituted against the state upon a claim for the value of such services, in such suit the fact that the attorney was not formally employed by the board is immaterial.

7. **Action: MOTION TO DISMISS: REAL PARTY IN INTEREST.** The legislature, with full knowledge of the circumstances, by joint resolution authorized the plaintiff to prosecute this action against the state to recover the value of legal services rendered by a competent attorney at law who had been employed by the plaintiff, while commissioner of public lands and buildings, in cases of importance and difficulty relating to the department of the board of educational lands and funds. Thereupon the attorney assigned his claim for such services to plaintiff. *Held*, That plaintiff's action should not be dismissed on the ground that he is not the real party in interest, and the admission of the attorney that he did not intend to enforce his claim against the plaintiff unless plaintiff was remunerated by the state will not defeat this action.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed on condition.*

Grant G. Martin, Attorney General, for appellant.

T. J. Doyle and G. L. De Lacy, contra.

SEDGWICK, J.

The plaintiff was commissioner of public lands and buildings during the years 1901 to 1904, inclusive. He alleges that during that time as commissioner he employed one Edwin J. Murfin, a practicing attorney at law in the state of Nebraska, to represent the interests of the state and the board of educational lands and funds in matters pertaining to the public school lands of the state, and that the legislature of the state duly authorized the plaintiff to prosecute this action against the state. The trial in the district court for Lancaster county resulted in a

judgment in favor of the plaintiff, and the defendant has appealed.

1. It appears that the defendant filed a general demurrer to the petition, which was sustained by the district court. Afterwards the plaintiff filed a motion to set aside the ruling upon the demurrer, and also filed an amended petition. The motion was sustained and the amended petition held sufficient. The defendant now contends that the first ruling upon the demurrer became the law of the case, and that it was error to set the same aside and admit evidence under the amended petition. It seems to be conceded that the district court has control of its own judgments and orders during the term of the court at which they were made, but the contention is that after the term of court at which the order is made it becomes final. *Marvin v. Weider*, 31 Neb. 774, is cited as authority for this position, and perhaps some of the language there used might suggest such a conclusion, but that case has been twice overruled by this court, in *Perry v. Baker*, 61 Neb. 841, and in *Tiernan v. Miller & Leith*, 69 Neb. 764.

2. The next contention is that section 4778, Ann. St. 1911, is unconstitutional and void so far as it authorizes the governor or chief officer of a department or institution to employ an attorney to appear on behalf of the state. Section 1, art. II of the constitution, provides: "The powers of the government of this state are divided into three distinct departments, the legislative, executive, and judicial, and no person, or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." It is said that under this provision of the constitution the attorney general is the "head or chief officer of the law department. * * * He is the law officer of the state, whose action cannot be controlled by the state board," and that the said section 4778 is a direct violation of that constitutional provision, "in that it attempts to authorize a person belonging to one

department to exercise the power properly belonging to one of the other departments." A casual reading of the section quoted will show that it cannot be so applied. It divides the powers of the government into three departments, the legislative, executive and judicial, and provides that the officers of one of these departments shall not perform the duties of the other departments, but, of course, has no application to a distribution of duties among different officers of the executive or administrative department of the state government.

It is further contended that the attorney general has entire control of the litigation in which the state is interested by virtue of the provision contained in the first part of the said section 4778. The attorney general is, generally speaking, the attorney for the state. It is his duty to devote his time and energies to that employment, as it is the duty of attorneys generally to appear and defend the rights of their clients in the litigation in which they are employed. He is given executive powers in regard to various matters committed to his care. The officers who by the constitution and laws are given charge of the affairs of the state will continue generally to control them, although there may be litigation in regard to them. Those officers are authorized by this section of the statute to employ "a competent attorney" in cases of importance or difficulty, not necessarily as assistants of the attorney general, but an attorney with the general powers of attorneys at law for the matters in which they are employed. It is, of course, for these officers of the different departments and institutions to determine within their discretion whether the case is of importance or difficulty so as to justify the employment of counsel. They are entitled to the opinion and advice of the attorney general upon questions of law relating to their several departments, but they are not necessarily controlled by that advice in matters especially committed to their care. If the law were otherwise, any executive office of the state could be controlled by the opinion of the attorney general specifying what the law requires to be done in that office.

3. It is next contended that the commissioner of public lands and buildings is not the "chief officer of the department or institution to which" this litigation related, and so was not authorized to employ an attorney. The commissioner of public lands and buildings is a constitutional officer. His duties, however, are not specifically defined in the constitution; and the constitution also establishes a separate board for the sale, leasing and general management of all lands and funds set apart for educational purposes, "in such manner as may be prescribed by law." Const., art. VIII, sec. 1. The legislature, as it is authorized by this section to do, has provided for the organization of the board. Ann. St. 1909, sec. 10357. By this statute the governor is made chairman, and the commissioner of public lands and buildings secretary of the board, but it appears that each member of the board, which consists of the governor, secretary of state, treasurer, attorney general, and commissioner of public lands and buildings, has equal authority in the management of the school lands and funds. It seems to follow that there is no "chief officer" of this board within the meaning of the statute. In the construction of the criminal code "the singular number includes the plural" (section 246), and also in the revenue law (Ann. St. 1911, sec. 10910). The wording of section 4778 suggests that construction here. Undoubtedly the section should be construed as though it read, "the governor or chief officer or officers of the department or institution," so that where there is a board established by law, and no one with greater power in the performance of the work of the board than another has, it should require a majority of the board to act in the employment of an attorney, as in other matters.

4. While the plaintiff held the office of commissioner of public lands and buildings, a controversy arose in regard to several thousand acres of land in Boyd county. These lands had been selected as a part of the school lands of the state, but settlers were occupying them and claiming them. We do not consider it necessary to state in detail

the conditions that caused this controversy. It is sufficient, for the purpose of indicating the questions of law that we think are involved, to say that the lands were valuable, and that the questions involved were complicated and difficult, and were affected by rulings of the land department of the government, and the matter was in litigation in the district court for Boyd county; it was transferred to the federal court of this district, and afterwards remanded, and was twice before this court.

This plaintiff and the then attorney general were both by virtue of their respective offices members of the board of educational lands and funds. They disagreed seriously as to the rights of the state in the matters involved and as to the proper course to be pursued to protect those rights. The attorney general at first advised that the lands in question be relinquished by the state to the general government in favor of the settlers, pursuant to an act of the legislature so providing. The plaintiff insisted that the act of the legislature in question was unconstitutional; that the title to the lands had become vested in the state, and under the provisions of the constitution could not be alienated. It developed afterwards that the plaintiff was right in this contention. The attorney general changed his opinion upon that point, and insisted that his first opinion was based upon an incorrect representation of the facts made by the plaintiff himself. It is unnecessary to examine the cause of the disagreement between these two public officers. If we suppose that they were both acting in good faith with a single purpose of protecting the rights of the state, it still appears, as is usual in such cases, that they allowed their personal controversy to give more or less color to their official acts. The attorney general was by virtue of his office a member of the board, and, as such, had equal authority with the other members in those matters which the law committed to their care. He was also the law officer of the state, and, as such, the members of the board were entitled to his advice upon questions of law affecting their power and duties. Under

such circumstances, and in matters of so much importance, if the board could have unanimously agreed to employ competent counsel, and the attorney general and such counsel could have represented the board in harmony and to the satisfaction of all the members, it would have been in the interest of the state. The plaintiff, not satisfied with the advice of the attorney general, submitted the principal question involved to the present chief justice of this court, who was then in the practice of law, and obtained his written opinion, which he submitted to the board. This opinion appears to have justified the views of the plaintiff as to the legal rights of the state. The board appears to have accepted this opinion with approval, and in general to have acted upon it. The plaintiff also early in the controversy employed Edwin J. Murfin, a member of the bar of this state, who appears to have made an exhaustive investigation of the whole controversy and submitted to the board the result of that investigation. The board received this communication and availed themselves of the information there contained. Mr. Murfin, during the whole course of controversy with the settlers, counseled and assisted the plaintiff in the discharge of his duties with respect to the matters involved, and it appears to be conceded by all parties that the amount of this claim would not be an unreasonable charge for the work performed by him. The contention is that the plaintiff had no authority in law to employ him on behalf of the state; that he was never employed by the board, who alone had such authority; that, the attorney general being the law officer of the state, whose duty it was to perform this labor without compensation other than his salary, the employment of Mr. Murfin was wholly unnecessary, and that for these reasons he is not entitled to compensation from the state. At a meeting of the board in September, 1903, while the litigation was pending in the district court for Boyd county, and in the absence of the attorney general, the board adopted a resolution introduced by Governor Mickey instructing this plaintiff "to take such

action as he may deem proper to defend the interests of the state" in that action in the district court. This appears to have been construed as an action on the part of the board determining the controversy that had existed between the plaintiff and the attorney general in favor of the plaintiff, with the effect of taking the control of the matter from the attorney general and placing it in the hands of this plaintiff. On the following day, at the request of the attorney general, Governor Mickey called a meeting of the board, and by the vote of three to two "the action of the board of educational lands and funds relative to the injunction brought against the commissioner of public lands and buildings in the Boyd county land case" was reconsidered and the action rescinded. This appears to have left the controversy between these two officers undetermined, the remaining three members of the board still being in doubt in regard to their duty in the matter, and the situation continued as before; the attorney general assuming to control the litigation as the law officer of the state, and the counsel employed by the commission of public lands and buildings attempting to represent that official, as the chief officer of the department, in the litigation. The court appears to have recognized the authority of the attorney general, but so far as pointed out in the brief, or as we have observed, the question as to the necessity of the employment of Mr. Murfin was not directly presented to, nor determined by, the courts in the progress of this litigation, nor have we discovered in this record that at any time the board of educational lands and funds repudiated the services of Mr. Murfin or expressed its disapproval of his employment. In the exhaustive and able brief of the state our attention is not called to any portion of the record showing such action by the board or by the courts. The board knew of his employment; they accepted the services he was rendering. Mr. Murfin's complete analysis of the situation, including the rulings of the land department of the government and the facts upon which the settlers on the lands based their claims, and a com-

prehensive brief of the questions of law involved and citations of the authorities upon those questions, were presumably of assistance to the attorney general himself, as well as to the other members of the board. If this controversy were between private individuals, the party accepting such service would be, not only morally, but legally, bound to compensate them. The joint resolution of the two houses of the legislature authorizing the plaintiff to bring this action against the state was presumably for the purpose of ascertaining whether the state has received benefit from the services procured by the plaintiff which would, as between private persons, create a legal liability, and we think such liability exists in this case.

5. It is said that as Mr. Murfin rendered the services in this case, and if any one is entitled to the compensation therefor, he is the real party in interest, and this action cannot therefore be maintained in the name of this plaintiff. It appears from the record that, before this action of the legislature, this plaintiff made a detailed report to the legislature of the whole transaction, showing that he, as commissioner of public lands and buildings, had employed Mr. Murfin, and that the services were rendered by Mr. Murfin, and upon that report the legislature authorized this plaintiff to bring an action against the state to determine the matter. Thereupon, Mr. Murfin made a formal assignment of his claim against the state to this plaintiff. The petition alleges the resolution of the legislature, and the assignment of the claim to the plaintiff. Mr. Murfin testified that he was employed by the plaintiff; that he expected his compensation to come from the state; and that, while he insisted that the plaintiff was liable to him for the amount of his claim, he did not intend to assert his claim against the plaintiff unless the state would remunerate the plaintiff, and that he had so informed the plaintiff. It is insisted that this testimony shows that the interest of the plaintiff in the case is colorable only, and that he is not the real party in interest. If it appeared that Mr. Murfin had released the plaintiff from all liability

action as he may deem proper to defend the interests of the state" in that action in the district court. This appears to have been construed as an action on the part of the board determining the controversy that had existed between the plaintiff and the attorney general in favor of the plaintiff, with the effect of taking the control of the matter from the attorney general and placing it in the hands of this plaintiff. On the following day, at the request of the attorney general, Governor Mickey called a meeting of the board, and by the vote of three to two "the action of the board of educational lands and funds relative to the injunction brought against the commissioner of public lands and buildings in the Boyd county land case" was reconsidered and the action rescinded. This appears to have left the controversy between these two officers undetermined, the remaining three members of the board still being in doubt in regard to their duty in the matter, and the situation continued as before; the attorney general assuming to control the litigation as the law officer of the state, and the counsel employed by the commission of public lands and buildings attempting to represent that official, as the chief officer of the department, in the litigation. The court appears to have recognized the authority of the attorney general, but so far as pointed out in the brief, or as we have observed, the question as to the necessity of the employment of Mr. Murfin was not directly presented to, nor determined by, the courts in the progress of this litigation, nor have we discovered in this record that at any time the board of educational lands and funds repudiated the services of Mr. Murfin or expressed its disapproval of his employment. In the exhaustive and able brief of the state our attention is not called to any portion of the record showing such action by the board or by the courts. The board knew of his employment; they accepted the services he was rendering. Mr. Murfin's complete analysis of the situation, including the rulings of the land department of the government and the facts upon which the settlers on the lands based their claims, and a com-

prehensive brief of the questions of law involved and citations of the authorities upon those questions, were presumably of assistance to the attorney general himself, as well as to the other members of the board. If this controversy were between private individuals, the party accepting such service would be, not only morally, but legally, bound to compensate them. The joint resolution of the two houses of the legislature authorizing the plaintiff to bring this action against the state was presumably for the purpose of ascertaining whether the state has received benefit from the services procured by the plaintiff which would, as between private persons, create a legal liability, and we think such liability exists in this case.

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upon consideration that the plaintiff should pay to him whatever he might recover from the state, there would be force in this objection, under the decision in *Hoagland v. Van Etten*, 22 Neb. 681. But, so far as this evidence shows, the liability of the plaintiff to Mr. Murfin still exists. Mr. Murfin's statement, after the services were rendered, that he would not enforce his claim against the plaintiff unless the plaintiff was remunerated by the state was wholly without consideration. Since the legislature has authorized this claim to be prosecuted in the name of this plaintiff, and Mr. Murfin has assigned his claim to the plaintiff, so that the result of this litigation will be a complete bar, we think the objection that the plaintiff is not the real party in interest should not be allowed to defeat this claim.

The jury found the amount of plaintiff's claim to be \$1,100, and upon this they compute interest from February 28, 1905, \$404.04, making the amount of the verdict, \$1,504.04. The record recites that the plaintiff's claim was filed with the legislature on the 28th of February, 1905. This was probably an error; but, however that may be, the resolution of the legislature was concurred in on the 1st day of April, 1909, and under the circumstances in this case the plaintiff should not recover interest prior to that date. In his claim before the legislature he does not ask for interest, and in the resolution authorizing the prosecution of this suit it is recited that the claim is for expenses incurred for services performed by Mr. Murfin, and there is no authority there given to prosecute any suit for interest, therefore there should be no recovery for interest prior to the authorization to bring this suit. The judgment was entered in the district court on the 27th day of May, 1910. The interest on \$1,100 from April 1, 1909, to that date at 7 per cent. would amount to \$89.26. The judgment therefore in excess of \$1,189.26 is erroneous. If the plaintiff will file with this court a remittitur of \$314.78 from the judgment within 60 days from the filing

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of this opinion the judgment will stand affirmed; otherwise the judgment will be reversed.

AFFIRMED ON CONDITION.

REESE, C. J., and ROSE, J., not sitting.

PHEBE A. GOODMAN, APPELLANT, v. LUVINA SMITH ET AL.,
APPELLEES.

FILED JUNE 26, 1913. No. 17,338.

1. **Parol Evidence: DEEDS: CONSIDERATION.** The true consideration for a deed of conveyance of real estate may be shown by parol evidence, although the deed recites a consideration.
2. **Trusts: RESULTING TRUSTS: LIMITATIONS.** When the property of an infant is sold and the proceeds invested in other property, the title to which is taken in the name of a friend of the infant who transacted the business, a resulting trust arises in favor of the infant. The statute of limitations will not begin to run against an action by the *cestui que trust* after becoming of legal age until she has notice that the trustee denies her right in the property.
3. **Appeal: EQUITY: TRIAL DE NOVO.** In an action in equity this court is required upon appeal to try the cause *de novo* upon the pleadings and evidence, and determine the matter independently of the judgment of the trial court. Upon the evidence in the record, the decree is reversed, with directions to enter a decree in favor of the plaintiff.

APPEAL from the district court for Johnson county:
JOHN B. RAPEL, JUDGE. *Reversed with directions.*

Jay C. Moore and Burkett, Wilson & Brown, for appellant.

S. P. Davidson, contra.

SEDGWICK, J.

Phebe A. Goodman began this action in the district court for Johnson county to establish her interest in cer-

tain real estate in that county which she claimed as an heir of her father, Thomas Phippin. The district court entered a judgment in favor of the defendants, from which the said Phebe A. Goodman appealed. Afterwards she died, and the action was revived in the name of her husband, Thomas Goodman, as administrator of her estate.

Thomas Phippin died in Waukesha county, Wisconsin, in 1847. He left surviving him his widow, Ann Phippin, and two children, the said Phebe, afterwards Phebe Goodman, and another daughter, who a few days later died in infancy. The widow, Ann Phippin, afterwards married Worthy Luce, and two children were born to them, the defendant, George Luce, and the defendant, Luvina Smith, formerly Luce. Phebe's mother, Ann Luce, formerly Ann Phippin, died in 1901 in Johnson county, Nebraska, and afterwards, in June, 1909, Worthy Luce died intestate in that county.

The petition alleges that when Thomas Phippin died he was the owner of 40 acres of land in Waukesha county, Wisconsin, and some personal property, and that under the law of Wisconsin at the time his two daughters inherited the land, and, upon the death of the younger daughter, the daughter Phebe inherited her interest in the land, so that Phebe became the owner of the 40 acres of land; that this 40 acres of land was afterwards sold for about \$1,600, and with the proceeds, together with about \$2,000 realized from 20 acres of land in Waukesha county owned by Mr. and Mrs. Luce, the real estate in question in Johnson county was purchased by Mr. and Mrs. Luce, so that this plaintiff is entitled to an undivided four-ninths interest in said real estate. After the death of Mr. and Mrs. Luce, these defendants, George Luce and Luvina Smith, claimed to be the owners of the land in Johnson county as the heirs of Worthy Luce, and that their half sister had no interest therein.

Did Thomas Phippin purchase and pay for the 40-acre tract? If he did, have the proceeds realized from that 40 acres been traced by this evidence to the purchase of the

land held in the name of Worthy Luce at the time of his decease? The deposition of one Ira Redford was in evidence upon the trial. He was a brother of the former owner from whom it is claimed Mr. Phippin purchased the land. He was working for Mr. Phippin at the time. He testified that Mr. Phippin gave his brother a yoke of oxen in the purchase, but he did not know whether he paid some money also. He saw his brother take the oxen away when the trade was made, and heard Mr. Phippin say that he (Phippin) would have no more trouble about complaints that his milldam caused the land to overflow, as he now owned the land himself. This, he says, was a year or two before Mr. Phippin's death. The witness shows that he was entirely familiar with the land, and with the business relations of his brother and Mr. Phippin, and with all of the persons then interested or in any way connected with the ownership of the land. He testified positively that his brother sold the land absolutely to Mr. Phippin and received full pay therefor from him. The witness was 78 years old when he testified. He made mistakes as to dates, or rather failed to be positive in regard to them, as well as other matters of less importance. His evidence shows that he had an active mind and clear ideas when he testified. He might not be expected to remember unimportant matters which happened more than a half century before, but his evidence seems clear and quite satisfactory as to the fact that the land was sold by his brother to Mr. Phippin, and the agreed payment received therefor, and that from the time of the purchase until his death Mr. Phippin exercised the rights of ownership of the land. This witness and several others testified that from the time of Mr. Phippin's death this tract was generally known as "Phebe's forty," and was so designated by Mr. and Mrs. Luce.

Mr. Phippin never received a deed of the land, and after his death a deed was executed by the former owner to Ann Phippin. It recites a consideration of \$25, and there is no other evidence cited in the briefs that she paid any-

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thing for the land. The consideration named in the deed can always be inquired into, and the preponderance of the evidence is that the consideration for this deed was Mr. Phippin's previous purchase and payment for the land. The evidence shows that there was always the best of feeling and entire confidence among these parties. None of them seems to have supposed that it made any difference who was named as grantee in a deed of real estate purchased by them. This 40 acres and the 20 acres afterwards purchased were deeded to Ann Phippin, afterwards Luce, and, when these two tracts were sold and the Nebraska land purchased with the proceeds, the deed was taken in the name of Worthy Luce, although the 20 acres were bought, or at least improved, with money received from land given Mrs. Luce by her father, and no one claimed that Mr. Luce himself furnished the money with which to buy the Nebraska lands. The three children were apparently treated alike by Mr. and Mrs. Luce, and they evidently supposed that Phebe had at least as large an interest as any of the three children in the property. A short time before his death Mr. Luce attempted to make an equal division of the three eighties among the three children. He agreed to give each of them an 80, and each of them was to pay to him \$1,000, which was supposed to be about one-fourth of the value of the land received. Upon their agreements to pay this amount he deeded an 80 to each of the three, and they took possession of the land, and Phebe paid the \$1,000 according to agreement, but the other two children failed to make any payment. Not long before his death Mr. Luce stated that the three children would get the property, and although some of this property clearly belonged to Mrs. Luce, and all of her children inherited from her equally, and the proceeds of Phebe's 40 were more than a third of the purchase price of the Nebraska land, still Mr. Luce assisted by his labor, and perhaps financially, in improving the land, and they all seem to have supposed that the fair proportion to Phebe, under all the circumstances, would be a one-third

interest. It is difficult to determine from this evidence whether Mr. Luce contributed money to improve these lands, and, if so, what amount, and it seems probable that the idea of Mr. and Mrs. Luce in that regard was substantially correct. At least Mrs. Goodman appears to have acquiesced in it. We think that the weight of the evidence is that Mrs. Goodman's property contributed one-third of the purchase price of the Nebraska land, and that she is entitled to share accordingly.

It is contended that the action is barred by the statute of limitations. As we have already said, there was no quarreling in this family. Each appears to have been willing to assist the others in any way possible. They all understood in a general way what the interest of each was in the property, and none of them had any reason to suppose that his or her right or interest would be denied by the others, until after the death of Mr. and Mrs. Luce, when his two children claimed the whole property. The interest of Mrs. Goodman, then, was held by Mrs. Luce in trust until the land was exchanged for Nebraska land, and afterwards was so held in trust by Mr. Luce, and the statute of limitations would not begin to run against the claim of Mrs. Goodman until the parties who held her property in trust denied her rights therein. The \$1,000 that Mrs. Goodman paid when she took title to the 80 acres of land above mentioned was invested in other lands, and she should have the benefit thereof. A decree should be entered allowing the plaintiff an interest in the land to the amount and value of \$1,000, and an equal one-third interest in the remainder.

The judgment of the district court is reversed and the cause remanded, with instructions to enter a decree as above indicated.

REVERSED.

REESE, C. J., LETTON and FAWCETT, JJ., not sitting.

STATE, EX REL. EDWARD B. McDERMOTT, APPELLEE, v.
CHARLES REILLY, APPELLANT.*

FILED JUNE 26, 1913. No. 17,921.

1. **Judges: POLICE MAGISTRATE: TERM OF OFFICE.** The office of police magistrate in cities of the second class having more than 5,000 and less than 25,000 inhabitants is created and the length of the term fixed by the constitution. The legislature cannot change the length of the term, nor remove the incumbent by legislation before the expiration of his term.
2. **Elections: POLICE MAGISTRATE: TIME OF ELECTION.** The provision of the constitution (art. XVI, sec. 13), fixing the time of holding general elections, and what officers shall be then elected, excepts "school district officers, and municipal officers in cities, villages and towns;" police magistrates in cities of the second class being municipal officers, the legislature may by statute provide the time of their election.

APPEAL from the district court for Buffalo county:
BRUNO O. HOSTETLER, JUDGE. *Reversed.*

John A. Miller and Frank E. Beeman, for appellant.

E. B. McDermott, W. L. Hand and H. M. Sinclair, contra.

SEDGWICK, J.

Kearney is a city of the second class having more than 5,000 and less than 25,000 inhabitants. At the election held on the 4th day of April, 1911, the respondent, Charles Reilly, was elected police judge of the city, pursuant to section 8510, Ann. St. 1909. He duly qualified and entered upon the duties of the office, and has since been performing them. At the general election in the fall of 1911 one Willis L. Hand received a plurality of the votes cast for the office of police judge of the city. It is stipulated that he filed his official bond as such police magistrate, and that the bond was approved. He demanded possession

* Rehearing denied. See opinion, p. 238, *post*.

of the office from the respondent, which was refused. This action was begun in the district court for Buffalo county upon the relation of the county attorney of that county to test the respondent's right to hold the office. The district court entered a judgment ousting the respondent from the office, and the respondent has appealed.

Several important questions are presented and discussed in the interesting briefs of counsel, but the two principal questions are as to the validity of the said section 8510, which depends upon the power of the legislature to fix the time of the election of police magistrates; and the validity and effect of the act of 1911 (laws 1911, ch. 23), in so far as it might result in removing the respondent from office before the expiration of his term fixed by the constitution. Section 13, art. XVI of the constitution, specifies what officers shall be elected at the general election, "except school district officers, and municipal officers in cities, villages and towns." The relator argues that police magistrates of cities of this class are not municipal officers, and are therefore not within the exception. He contends that they are district officers and are within the general provisions of that section of the constitution. The only basis of this contention, so far as we can see, is derived from that part of section 18, art. VI of the constitution, which provides: "Justices of the peace and police magistrates shall be elected in and for such districts, and have and exercise such jurisdiction as may be provided by law." It is said that the legislature may create districts of any extent for police magistrates, and so extend their jurisdiction beyond the city limits; and, as the legislature by the act of 1911 (laws 1911, ch. 23; Comp. St. 1911, ch. 14a, art. II, sec. 1) has extended such jurisdiction for three miles beyond the city limits, by so doing it has created a district and made the police magistrate a district officer, which requires that he must be elected at the general election. If this is the correct construction of the constitution and statutes, the police magistrate of Omaha has jurisdiction in South Omaha, if not also in Council Bluffs, and the

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police magistrate of South Omaha has like jurisdiction in Omaha. The magistrate of Kearney has jurisdiction of a part of the adjoining county, and, if the legislature should see fit, that jurisdiction might be extended so as to include Lincoln and Omaha. It does not seem to be necessary to determine this curious question, because even if such a district could be created by the legislature, and the jurisdiction of the police magistrate extended accordingly, he would still be a municipal officer within the meaning of the constitutional provision which we are considering. He would still, under present constitutional and legislative provisions, be chosen by the voters of the municipality. The only thing that the constitution fixes is to create the office of police judge and fix the length of the term. It does not prescribe when the term shall begin, nor when he shall be elected, nor in fact whether he shall be elected or appointed, nor how he shall be paid, nor what bond he shall give, nor who shall approve the bond; all of these things are fixed by the legislature, and are by the legislature made municipal matters. If the legislature could create a judicial district without reference to the present judicial districts, providing a judge for the district, with jurisdiction not superior to the present district courts, and attempted to do so without giving all the voters of the district a voice in his election, such legislation would probably be invalid. We do not think the legislature has attempted any such thing.

The police magistrate of a city, being a municipal officer, is especially exempt from the general provision of the constitution as to the time of his election, and that matter is left to the legislature. The office of police magistrate is undoubtedly a constitutional office in that the constitution provides that there shall be such an office and fixes the length of the term; all other matters with reference to the office are left to the legislature, and as to them it is a legislative office.

In *State v. Mayor*, 91 Neb. 304, this court took a different view, but upon motion for rehearing and further

consideration another argument was ordered. Afterwards the litigation was settled between the parties thereto, and the court had no opportunity to correct its former opinion. That opinion is not to be considered as authority, therefore, upon any of the points therein determined.

County of Douglas v. Timme, 32 Neb. 272, is not authority in this case for three reasons: The principal and sufficient reason is that this question was not involved. The only question in that case was whether the legislature could increase the compensation of an officer during his term, and, there being no provision in the constitution to the contrary, the court held that the legislature could do so. This does not affect this case.

In *State v. Stuht*, 52 Neb. 209, the act criticised provided that the police magistrate elected in Omaha in 1897 should enter upon his term of office before the term of the then incumbent expired, thus abridging the term of the incumbent, and this it was held the legislature could not do, since the constitution fixed the term of the incumbent at two years. It was because the legislature could not shorten the term of the incumbent that the time fixed for the new term to begin was in violation of the constitution, and not because the constitution fixed definitely when each term shall begin. This case is not governed by *State v. Stuht*, *supra*, nor *State v. Moores*, 61 Neb. 9. Neither of those cases depends upon the question here involved. Neither of them depends upon the question whether the constitution fixes the time of the year in which the term of the police magistrate must begin.

The contention that section 8510, Ann. St. 1909, not being repealed by the act of 1911, is still in force, and other contentions in the brief are not necessary to this decision. The constitution provides that the term of police magistrate shall be two years. The respondent was duly elected to that office in the spring of 1911, and his term of office did not expire until the end of that time.

The judgment of the district court is reversed and the cause remanded.

REVERSED.

FAWCETT, J., dissenting.

The majority opinion ignores a number of important and, to my mind, controlling questions presented in the record and fully argued in the briefs and at the bar.

The case was tried upon a stipulation of facts, from which it appears that respondent has been performing the duties of police judge for many years, having been elected and re-elected from time to time at city elections held in the spring; his last election being on April 4, 1911. Under that election he qualified two days later and entered upon the discharge of his duties. On April 8, 1911, the legislature passed, with an emergency clause, an act relating to police magistrates. Laws 1911, ch. 23. At the general election in November, 1911, one Willis L. Hand received a majority of the votes cast for police magistrate, was declared elected, filed his bond and oath, and demanded the office, which respondent refused to deliver.

It is stated in the brief of respondent: "The legal questions involved in this case are the same as those involved in the case of the *State, ex rel. Benson, v. Mayor and Council of City of Hastings*, 91 Neb. 304." The decision in that case is then vigorously assailed by respondent. We there, without division, held: "The office of police magistrate being a constitutional office, and the constitution having fixed the time when such officer shall be elected, the time when, after election, he shall enter upon his term of office, and the duration of such term, the requirements of the constitution in those particulars must be complied with; and any attempt on the part of the legislature to provide for the election of such officers in any other manner or at any other times than fixed by the constitution is void." For our reasons in so holding, reference is made to the opinion in that case. Further consideration of the questions there decided leaves the writer still of the opinion that the decision was right, and that it should be adhered to.

The majority opinion errs when it states that "the court

had no opportunity to correct its former opinion." The final disposition of that case will be found in a *per curiam* order reported in 91 Neb. 852, as follows: "This cause was argued and submitted, and in due time a decision was rendered. The opinion is reported, *ante*, p. 304. A motion and briefs for rehearing were filed, and, upon further reflection and examination, some of the members of the court became doubtful of the correctness of the decision, and argument was ordered upon the motion for rehearing. When the cause was called for hearing, it was shown that the respondents had complied with the commands of the alternative writ of mandamus in all things and no rights could be protected or enforced by any further hearing. The motion for rehearing is overruled." The fact that the parties to that action had settled their differences and complied with the judgment of the district court could not prevent us from correcting our decision, if wrong. In justice to the district judges throughout the state, it was our duty to have done so. Not having made any correction, our judgment in that case stood in full force and effect, and was binding upon the trial courts of the state. The learned judge of the district court for Buffalo county undoubtedly took that view of the matter. We have, then, this situation: In *State v. Mayor* we affirmed the judgment of the district court for Adams county. The district court for Buffalo county followed our judgment. We now reverse its judgment. Our own former holding and the holdings of two district courts, one of them based upon our holding, are swept aside by a divided court. And yet some say that the law is an exact science. I have always insisted and still hold that decisions of this court should not be set aside by a "majority vote" of the court as subsequently constituted. I am all the more insistent upon that point because the attention of the court was called to the alleged error in the former decision, while the case in which it was rendered was still before it and might have been corrected, if wrong, before the decision became final, and binding upon the trial courts of the state.

BARNES, J., concurs in above dissent.

The following opinion on motion for rehearing was filed September 26, 1913. *Rehearing denied, and case dismissed:*

SEDGWICK, J.

Counsel for relator have filed an ingenious brief upon their motion for rehearing, in which they assert: "If the opinion already rendered in this case stands, the legislature will never be able to provide for a police magistrate's court for prescribed districts and also for municipal courts for cities and towns, but will be limited to just the one court, that of the police magistrate. So far this court recognizes but one of these courts. By its opinion herein this court has entirely nullified that part of section 1, art. VI of the constitution, that authorizes the legislature to create municipal courts for cities and towns. And this was done without naming that section at all." They then ask the question: "Does the court want to leave these questions in this chaotic condition?"

The two questions determined in our former opinion (*ante*, p. 232) herein seem so clear and simple as not to require further comment, but the matter is of so much importance, and counsel are so vigorous and persistent in suggesting difficulties in the way of city authorities, that we have concluded to attempt an answer to some of their many contentions more or less related to the matters involved in this litigation. In the former opinion it is determined that the length of the term of office of police magistrates is fixed by the constitution, and the legislature cannot shorten the term, and cannot legislate the incumbent out of office during the term for which he was elected; that this is the only limitation upon the legislature in regard to this office, and therefore the legislature may, by appropriate legislation, provide for the election of such officers at the municipal election or at the general

election as it sees fit. Under the statute as it then existed the respondent was elected in the spring of 1911, and, as the constitution fixes his term at two years, the subsequent act of the legislature changing the time of the election to the general election in the fall of that year could not have the effect to shorten his term. In answer to this reasoning it was contended that the constitution also fixed the time of the election at the general election, and therefore the statute under which respondent was elected was invalid, so that there could be no valid election in the spring of 1911, and respondent was therefore not entitled to the office. This answer was based upon the further contention that the office of police judge in the city of Kearney is not a municipal office, and therefore not within the exception of section 13, art. XVI of the constitution. This last point was the gist of the controversy; it is the point relied upon in the dissenting opinion, although that dissent is wholly based upon the opinion in *State v. Mayor*, 91 Neb. 304, 852. The majority thought that, a reargument having been allowed in that case and the case having been disposed of by settlement of the parties thereto before the formal hearing was had, the opinion first filed should not be regarded as a precedent, and, even if it was so regarded, it was so manifestly wrong in holding that a police officer of a city is not a municipal officer that it ought to be overruled.

It was not held in our former opinion that the act of 1911 (laws 1911, ch. 23) is in any respect invalid. It was only held that that act could not have the effect to oust from office before the expiration of his term one who was duly elected and qualified before that act took effect. This, as before stated, was solely because the constitution fixed the length of the term. On the other hand, it was expressly held that "the legislature may by statute provide the time of their election." When the legislature has provided the time, an election may be held at the time so provided to fill a vacancy that may exist by the expiration of the term of the incumbent. The election of Mr. Hand

in the fall of 1911 was void because there was then no vacancy to be filled. The constitutional term of the respondent had not expired.

We cannot see any dilemma for the legislature, as suggested in the above quotation from relator's brief. By section 1, art. VI of the constitution, the legislature may establish courts inferior to the district court for cities and incorporated towns. Such courts "for cities and incorporated towns" will of course be municipal courts, and the legislature may provide the time of election, and, except for police magistrates, may also fix the term of office. The constitutional limitation of the power of the legislature to alter the length of the term of police magistrates may not be necessary, but section 20, art. VI, seems to so provide and has been many times so construed. Section 18, art. VI, provides that police magistrates shall be elected, "in and for such districts * * * as may be provided by law." If under this provision the legislature should divide our larger cities into districts and provide for the election of a police magistrate in and for each district, such police magistrates would still be municipal officers. They would in a sense be district officers; that is, they would be elected in and for a municipal district. When the constitution was adopted there were established courts in existence in this state with well-known jurisdictions, called "district courts." These courts were continued by section 1, art. VI of the constitution.

The legislature may establish "other courts" which must be inferior to the "district courts," but the district courts are continued in existence by the constitution itself. To say that, because the legislature may establish courts "inferior to the district courts" which are the creatures of the constitution, it therefore follows that, if the legislature divides a city or town into districts and authorizes a police court in each district, such court becomes a "district court," within the meaning of the constitution, and because it is a district court it cannot be a municipal court,

seems puerile in the extreme. If such a court can be called a district court of the municipality or a district court in any other sense, it is not the "district court" which the constitution requires and permanently establishes. And if it is a district court in any sense, even if a constitutional court, it would still be also a municipal court. But it is not established by the constitution, and any court that the legislature may establish for the city is a municipal court, and is wholly within the power of the legislature, with the one exception that the term of police judge must be two years. If the court established by the legislature for the city is not a police court, then this exception does not exist. In *State v. Moores*, 70 Neb. 48, it is said in the opinion of Mr. Commissioner GLANVILLE that the police judge of Omaha is a district officer, and not a municipal officer. This statement is a clear *non sequitur*, as already shown. The statement had nothing to do with the case then being considered. The point decided and the law of the case are stated in the syllabus. The conclusion reached is right, and the mistake of the court was in not placing the opinion in the unofficial reports.

There are several other decisions of this court involving the controversy of Judge Gordon as to his office and salary. In some of these decisions there are expressions used *arguendo* which perhaps are somewhat misleading. But the questions raised and decided are simple and rightly determined.

Prior to 1897 the charter of Omaha provided that the police judge or police magistrate should be elected at the general election in the fall, and the salary should be \$2,500 a year. In 1897 the legislature amended the charter, and provided that the police judge should be elected in the spring, and the salary should be \$1,200. Gordon was elected to the office in the fall of 1895 for a term of two years, beginning in January, 1896, and ending in January, 1898. An election was held in the spring of 1897 under the new act, and Gordon received a plurality of the votes cast. From that time the authorities refused to pay him

more than \$1,200 a year, and he brought an action in mandamus to compel them to pay him at the rate of \$2,500. The court held (*State v. Moores*, 61 Neb. 9) that the act of 1897 was void, and that the relator was holding under his election of 1895, and that until his successor was duly elected and qualified he held as of his original term, and was entitled to his salary of \$2,500 a year during all of the time that he so held. This holding was followed in several subsequent cases. Then in the fall of 1901, at a general election, Gordon was a candidate, and Berka was also a candidate. Berka was elected for the term commencing in January, 1902, and duly qualified and performed the duties of the office. Gordon brought another action in mandamus to compel the authorities to pay him a salary for the years 1902 and 1903, and it was held (*State v. Moores*, 70 Neb. 48, third paragraph of the syllabus): "That a successor to relator for the office of police judge has been elected and qualified; that relator was not the incumbent of such office during the time for which he is seeking herein to enforce payment of salary, and that the writ prayed for was properly denied."

This was of course clearly right. The attempted legislation of 1897 had been held to be void. The term, therefore, was, as it always had been, for the two years commencing in January, and the police judge was, as he always had been, elected at the general election in the fall. Gordon had been allowed to hold over until his successor was duly elected at the fall election and had qualified and served, then he was refused any salary from that time on. That was what was decided in *State v. Moores*, 70 Neb. 48, and nothing else was decided, as will appear from the reading of the syllabus in that case. In the two opinions that were filed in that case, there is no clear and consecutive statement of the facts upon which the decision was founded. It was not necessary to discuss whether the police magistrate was a district officer or a municipal officer, and it does not appear that any such question was presented or discussed by the counsel. The statement that

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it was a district office had nothing to do with the case. There was a rehearing granted, and Commissioner GLANVILLE's opinion was done away with. In Commissioner OLDDHAM's opinion there is also some language *arguendo* which is now construed to mean that the office of police magistrate is not a municipal office, but no such point was decided in the case nor necessary to the decision.

To say that an officer elected by the voters of a municipality to an office established by the legislature in and as a part of the city charter, an officer who must hold office within that municipality, whose chief function is to construe and enforce the ordinances of the municipality, whose bond is presented to and approved by the municipality, is not a municipal officer, within the meaning of the constitution, appears to be ridiculous upon its face. The voters of the city elect him as they elect other officers of the city, and the intention of the constitution was to allow them to elect all municipal officers at the same election. The act of 1897 was not held invalid because the legislature could not provide for electing the police judge at the city election, but because they attempted to change the length of the term, which the constitution does not allow. The first case (61 Neb. 9, opinion by Justice NORVAL) clearly states this.

The motion for rehearing is overruled, and the case

DISMISSED.

JULIA A. ADAMS ET AL., APPELLEES, V. AFFA C. SEELEY ET AL., APPELLANTS.

FILED JUNE 26, 1913. No. 17,034.

Trial: MOTION TO DISMISS: SUBSEQUENT PROCEEDINGS. The fact that the defendant in the trial of a case to the court, when the plaintiff rests, interposes an objection that plaintiff has failed to establish a case, and moves that plaintiff's action be dismissed, does not preclude the defendant, in the event of a ruling adverse to his contention, from proceeding with the trial and offering such

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evidence as he may have in support of his answer stating a defense, and it is prejudicial error for the court under such circumstances to refuse to hear further evidence and to render a judgment for the plaintiff.

APPEAL from the district court for Frontier county:
ROBERT C. ORR, JUDGE. *Reversed.*

H. W. Keyes and J. L. McPheely, for appellants.

W. S. Morlan and J. L. White, *contra*.

HAMER, J.

This is an appeal from the district court for Frontier county. The plaintiffs brought an action against the defendants seeking to quiet title to the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ and the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 34, township 8, range 28 west of the sixth P. M., in Frontier county. The record shows that the plaintiffs introduced their testimony and rested. Then the defendants moved the court to find for the defendants and to dismiss plaintiffs' case. Thereupon the plaintiffs asked the court that the case be submitted upon the pleadings and evidence. After that the defendants asked leave to withdraw their motion to dismiss and to introduce further testimony in support of the allegations of their answer, and this was denied.

The journal entry touching the motion of the defendants to dismiss the plaintiffs' case and to introduce further evidence in support of the allegations of their answer shows: "The plaintiffs introduced their testimony and rested. Thereupon the defendants moved the court, on the pleadings and the evidence introduced, to find for the defendants and dismiss plaintiffs' case. Upon said motion of the defendants, the plaintiffs joined, and asked that the case be submitted upon the pleadings and the evidence already introduced on behalf of the plaintiffs. Thereupon the defendants asked leave to withdraw their motion to dismiss, and to introduce testimony in support of the allegations of their answer. Said motion of the defendants

was denied by the court, to which ruling of the court the defendants duly excepted."

The journal entry further shows that there was a judgment in favor of the plaintiffs quieting the title to the land above described. An examination of the bill of exceptions fully sustains the journal entry touching the motion of the defendants to dismiss the action and what was said and done by the plaintiffs; that the defendants attempted to withdraw their objection and to offer the court testimony in support of their answer to the petition; and that the offer to withdraw the objection and the offer to produce testimony were both denied. Counsel for the defendants offered to call one John Melvin to the stand, whereupon counsel for the plaintiffs, Mr. Morlan, said: "I think this thing has gone far enough. We object to John Melvin taking the stand, and, further, the counsel is in contempt of court. * * * Mr. McPheely: The defendants, Paul S. Seeley and Affa C. Seeley, now offer to prove—Mr. Morlan: We object to making any offer to prove anything; the court has ruled on this, and no offer should be made in the present condition of the case. Objection sustained. Defendants except."

We think an examination of the authorities will conclusively show that the action of the trial court was an abuse of discretion. In *Gillette v. Morrison*, 9 Neb. 395, counsel for the plaintiff asked leave of the court to withdraw his rest, and for leave to introduce the journal entry showing the setting aside of the other journal entry constituting a judgment against the defendant. The court refused the request and sustained the motion for nonsuit. Held, that the district court should have granted the request of counsel for the plaintiff, and that his refusal to do so was an abuse of discretion, for which the judgment must be reversed and a new trial granted.

Section 1 of the code provides: "Its provisions, and all proceedings under it, shall be liberally construed, with a view to promote its object and assist the parties in obtaining justice." Would that be a "liberal construction," and

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would it tend to "assist the parties in obtaining justice" to forbid the defendant to prove his defense, as alleged in his answer, simply because he objects to the sufficiency of plaintiff's evidence?

The error of the trial court is doubtless due to the fact that it mistook the rule applicable to cases being tried before a jury where each party moves for a directed verdict to be applicable to this case. There is no similarity, and in this case counsel for the defendants *was careful not to agree to submit the case upon the evidence*. He was all the time seeking to *reserve* the right to *introduce his evidence*. He made his motion objecting to the sufficiency of the evidence for the plaintiffs, but he never waived his right to introduce evidence on behalf of his clients to establish their defense. The judgment of the district court is reversed.

REVERSED AND REMANDED.

CHARLES A. GRIMMEL, ADMINISTRATOR, APPELLEE, v. ANNA
H. BOYD ET AL., APPELLANTS.

FILED JUNE 26, 1913. No. 17,339.

1. Carriers: PASSENGER ELEVATORS: LIABILITY. "One who installs passenger elevators in his building for the use of his tenants and the public generally is subject to the same degree of care in transporting and protecting his passengers as is imposed upon common carriers." *Quimby v. Bee Building Co.*, 87 Neb. 193.
2. ———: ———: ———. Where the defendants were the owners of the building described in the petition and referred to in the evidence, and maintained and operated therein a passenger elevator for the accommodation of their tenants and persons having business with their tenants, or desiring to call upon them, these facts constituted the defendants common carriers of passengers, and as such common carriers it was their duty, and the duty of their servant, to use the highest degree of care possible, consistent with the practical operation of said elevator, to avoid injury to passengers while being carried from one portion of said building to another.

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3. ———: ———: ———. It was the duty of defendants in such case to have some one in charge of the elevator as a conductor, and the said conductor was charged with the duty of exercising on behalf of his employers the highest degree of care possible, consistent with the practical operation of the elevator, with a view to avoiding injury to passengers. In such case it was the duty of the conductor to see that the door to the shaft was not left open.
4. ———: ———: NEGLIGENCE OF PASSENGER: REVIEW. It is the duty of one who approaches the entrance to an elevator to enter the same to exercise that degree of care which a person of ordinary prudence would exercise under like circumstances; and, when the question as to the exercise of such care is properly submitted to the jury, the verdict will not be disturbed.
5. ———: ———: ———: ———. One who attempts to enter an elevator for the purpose of being carried to another part of the building should act with such care as a person of ordinary prudence would exercise under similar circumstances, and, if he fails to do so and his negligence contributes to cause an injury which he receives, the owner of the building is not liable for the damages sustained; and, where the question of the exercise of such care has been properly submitted to the jury and a verdict has been rendered for the plaintiff under evidence which supports it, the verdict should remain undisturbed.

APPEAL from the district court for Douglas county:
WILLIAM A. REDICK, JUDGE. *Affirmed.*

Greene, Breckenridge, Gurley & Woodrough, for appellants.

Duncan M. Vinsonhaler and W. H. Farnsworth, contra.

HAMER, J.

Counsel for the appellants are to be congratulated upon the clearness of their contentions. The plaintiff in the court below recovered a judgment against the defendants for damages in a personal injury case, where it is claimed that the plaintiff's decedent was killed by being caused to step into an elevator shaft through the negligence of the defendants. The widow, son and daughter of the late Governor Boyd are made defendants. They are alleged to be

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the owners of the Boyd Theatre building in Omaha, which at the time of the unfortunate tragedy contained 13 or 14 rooms occupied as offices or studios. Of these, the corner room at the west end of the hall on the fourth floor was occupied by Mrs. Walter Dale as a studio for instruction in vocal music. Miss Bessie Chambers, the decedent, had been Mrs. Dale's pupil for a period of about six months, and had been going to her studio at 5 o'clock in the afternoon once a week for that time. There is a passenger elevator in the building, the entrance to which on the fourth floor is about 55 feet from the west end of the hall on that floor, and about 40 feet from the door of Mrs. Dale's studio. The hallway is about 5 feet wide, and perhaps 80 feet in length, or a little more. There is a window in the west end of the hall facing the Y. M. C. A. building across the street, and another window about 20 feet east of the elevator on the south side of the hall, which faces an alley. The entrance to the elevator is similar to the doors to the offices. The door to the elevator sets into the north wall of the hall 8 or 10 inches from the outside of the door casing. The elevator was in charge of a colored man named Sam Madison. There was an electric light or lamp in the elevator cage, which it is claimed by the defense was always lighted. On March 16, 1910, Miss Bessie Chambers was at Mrs. Dale's studio with Miss Mary Ellsworth. After she had finished her lesson the three ladies, Mrs. Dale, Miss Ellsworth and Miss Chambers, left the studio together and walked along the hall east towards the elevator. It is said that Miss Chambers was on the north of the hall on the side nearest the elevator, and that Miss Ellsworth was on the south side of the hall, and that Mrs. Dale was in the middle, as the three walked abreast toward the elevator. It was about half past five in the afternoon, and was growing dark in the hallway. It is claimed by the defendants that Madison, who was in charge of the elevator, said nothing to any of the ladies, and that no one of them said anything to him, also that the ladies saw this colored man standing at the window which faced to the

south. It is further claimed by the defense that this man **did not approach the elevator, and that he made no movement of any kind, and that he remained in the position where he was when the ladies first saw him near the window until after the accident happened which resulted in the death of Miss Chambers.** It is claimed by the defense **that Mrs. Dale did not lock her door when Miss Ellsworth and Miss Chambers left the studio, and that she was not leaving for the afternoon, and therefore was not herself intending to use the elevator, and that as the three young women walked down the hall from Mrs. Dale's door toward the elevator they were laughing and talking, and that the subject of their conversation was facial massage; that when they got to the elevator entrance, or near it, they stopped; that they could not have seen the opening if they had looked. There is no evidence that Miss Chambers did not see the elevator entrance, or that she had her attention called in any way to the fact that the elevator itself was *not there ready to be entered.* It is further claimed by the defense that Miss Ellsworth did not look to see whether the door to the elevator was opened or closed, and it is claimed that Mrs. Dale saw that the elevator was not there. It is **not, however, claimed that Mrs. Dale or Miss Ellsworth called the attention of Miss Chambers to the fact that the elevator was not there. Miss Chambers seems to have been looking toward Mrs. Dale. Just before she stepped into the shaft, where she fell to her death, she said to Mrs. Dale: "You haven't." As she said that, she turned from Mrs. Dale and stepped into the elevator shaft, fell to the bottom of the shaft, and was instantly killed. The door of the elevator shaft was open, and the elevator itself was above the floor.****

That the matter may be the better understood, we quote a small part of the evidence from Miss Ellsworth's testimony as to just what transpired at the elevator: "Q. I don't care to go any further with it. When Miss Chambers made this remark of these two words, 'You haven't,' she was looking towards Mrs. Dale? A. Yes. Q. That was

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away from the opening into the elevator? A. Yes. Q. And instantly, without looking into the opening of the elevator, she turned and stepped in? A. Yes." Mrs. Dale's statement is as follows: "And as we stood there talking and laughing for a few seconds, I think it must have been inside a half a minute, and I made a little remark, and she laughingly answered me, and turned and stepped quickly into the shaft." Miss Ellsworth testified: "Q. You should say she stepped first before she looked into the shaft? A. Yes; she turned as she stepped, but— Q. The turning and the stepping were about the same time? A. Yes. Q. *She didn't look before she stepped, however, did she?* A. *I don't think so.*" Mrs. Dale testified: "Q. Miss Chambers didn't look toward the opening into the elevator before she stepped into it, did she, Mrs. Dale? A. I didn't see her look. * * * Q. So, if she had looked, turned around and looked at the shaft or the opening into the elevator, she could have seen it; she was where she could have seen? A. You mean I could have seen if she looked? Q. No; *she was where she could have seen if she had looked?* A. Yes. * * * Q. Did I ask you, Mrs. Dale, whether Miss Chambers stepped into the shaft sideways, or did she turn clear around and step in it facing, squarely facing, the shaft? A. My remembrance is she wheeled on her left foot and stepped in with her right. Q. Stepped forward with the right foot? A. Yes."

By a stipulation it appears that Madison was up on the fourth floor. Why he was up there no one seems to know. There is no showing that Miss Chambers saw that the elevator was not there, or that Miss Ellsworth or Mrs. Dale called her attention to the fact that it was not there, or that the light, claimed to be in it, was not shining. The elevator had gone up the elevator shaft. It does not appear that there is any evidence to show why it went up the shaft.

Appellants complain of the eighth instruction, which is as follows: "By negligence of the defendants in this case is meant a failure on the part of the defendants' servant to

exercise that high degree of care required of a common carrier of passengers, as elsewhere defined in instruction No. 4. By contributory negligence is meant any negligence of plaintiff directly contributing to the accident. By ordinary care is meant that amount or degree of care which common prudence and a proper regard for one's own safety required under the circumstances shown in the evidence."

As the fourth instruction was referred to in the eighth, we copy that part of it which we deem material. It is contended by the appellants that they were not negligent in fact, and that they should not have been held to be negligent as a matter of law. It is then contended that the act of Bessie Chambers in stepping into the open elevator shaft was contributory negligence, and that it proximately caused her death.

The door of the elevator shaft was open, and every witness agrees to that. The elevator was not at the bottom of the shaft, and every witness agrees to that. If Madison, the servant employed to run the elevator, had kept it down on a level with the door of the shaft, the accident could not have happened. The fourth and eighth instructions are particularly applicable to this.

In the fourth instruction it is said: "It was the duty of the defendant in this case to have some one in charge of said elevator as conductor, and the evidence establishes that they employed one Sam Madison in that capacity, and he was charged with the duty of exercising on behalf of his employers the degree of care required of a carrier of passengers, as above in this instruction defined; therefore, if you find from the evidence that Madison knew, or in the exercise of the high degree of care required of him ought to have known, that Bessie Chambers or other persons in the building were intending to use the elevator at the time in question, it was his duty to so manage and control said elevator as to avoid injuring any one attempting to enter the same while using ordinary care; and, if you further find from a preponderance of the evidence that said Madison left the door of the elevator shaft open and the elevator

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unattended, you should find defendants guilty of negligence; and, if you further find from a preponderance of the evidence that the death of Bessie Chambers was the direct and proximate result of such negligence, and that her next of kin have suffered pecuniary loss in consequence thereof, your verdict should be for plaintiff, provided you do not find that said Bessie was guilty of negligence, as elsewhere instructed, directly contributing in any degree to cause her death."

By instruction No. 8, and also by instructions Nos. 5 and 6, the jury were informed that it was the duty of Bessie Chambers, upon approaching the elevator entrance and entering the same, to exercise that degree of care which a person of ordinary prudence would have exercised for her own safety under the circumstances. This idea is clearly expressed in at least the three instructions mentioned. As we view the matter, the jury were properly charged concerning the rule of contributory negligence. The fourth and eighth instructions, given by the court on its own motion, are models of clearness. It is contended by counsel for appellants, with much force, that when the jury were told that the defendants were negligent because Sam Madison was not within the elevator or at the entrance to it, so as to prevent any person from going into the shaft when the elevator was not there, the issue of Bessie's negligence might as well have been withdrawn from the jury. The man in charge of an elevator is, from the nature of his occupation, required to be continuously on hand. It is his business to see that the door to the shaft is not left open, and that those seeking passage do not fall to their death through his conduct. In this particular case the conduct of Madison, who was in charge of the elevator, would seem to be particularly subject to censure. He had the elevator up on the fourth floor. He left the door to the elevator shaft open and unguarded. He permitted the elevator to climb up the shaft, so that there was nothing to prevent the unfortunate girl, when she stepped into what she supposed was a safe place, from be-

ing precipitated to the bottom. The fact that he stood there near the elevator shaft was a sort of guaranty that one might safely step within and find himself standing in the elevator. In view of the facts, the language of the instruction seems temperate and guarded. In view of the circumstances of this case, it was probably very difficult for the jury to find otherwise than that Madison left the door of the shaft open and unattended, except that he stood not far away from it, and that he did not call Bessie's attention to the fact that the elevator had gone up the shaft, and that it was a pitfall of death that awaited her if she stepped in. The main questions were left with the jury. Bessie was required to exercise ordinary care. If she did not, then she was guilty of negligence. If she was guilty of negligence that directly contributed to her death, then the defendants were not guilty. This matter was properly left with the jury, and they found for the plaintiff.

The elevator shaft is a perpetual menace to those who would use the elevator. No means of public carriage is used so frequently as an elevator. It is used many times a day, and it is and ought to be the duty of the man who is left in charge of it to protect those who use it, and to see that the elevator itself may be safely entered when it is used, and that it is at the entrance to the elevator shaft so the passenger may step into it.

The fourth instruction is further criticised by counsel for the defendants in this way: In the fourth instruction it is assumed that Madison had notice of the intention of Bessie Chambers to immediately enter the elevator. It is then said that there is no evidence that "he had any such notice, and no pretense that she or either of the two ladies with her indicated such purpose." For what purpose do persons in the fourth story of a building go to an elevator? It would seem that they go there to use it. The cases of *Knapp v. Jones*, 50 Neb. 490, *Omaha H. R. Co. v. Doolittle*, 7 Neb. 481, *Village of Culbertson v. Holliday*, 50 Neb. 229, and *City of Beatrice v. Forbes*, 74 Neb. 125, are cited, touching the want of ordinary care and contributory negli-

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gence. We are unable to accept the views of counsel for the appellants. To us the cases which they cite do not seem to be in point. We find no errors prejudicial to the defendants.

It is contended with great earnestness that the verdict is excessive. Bessie was helping her father and mother in a substantial way. To the mother she gave \$25 a month out of her earnings, and to the father she contributed \$10 a month toward his support. She assisted in the house-keeping and in the household work. No one may say that she might not in the future provide more for her parents than she was then providing. She was 29 years old, and she was cultivating herself. Each year, perhaps, she would be able to earn a little more than she had earned in the past. We are unable to say that the amount of the verdict is excessive.

The judgment of the district court is

AFFIRMED.

REESE, C. J., LETTON and FAWCETT, JJ., not sitting.

CASES DETERMINED
IN THE
SUPREME COURT OF NEBRASKA
SEPTEMBER TERM, 1913.

**STATE, EX REL. EDWARD GUNNARSON, APPELLEE, V. NE-
BRASKA CHILDREN'S HOME SOCIETY ET AL., APPELLANTS.**

FILED SEPTEMBER 26, 1913. No. 17,235.

1. **Habeas Corpus: VENUE: CUSTODY OF CHILD.** An application for a writ of habeas corpus by a parent to recover the possession of his minor child may be brought in the district court in the county where the unlawful detention takes place. Whether it may also be brought in the county where the relator resides is not decided.
2. **Parent and Child: SURRENDER OF CUSTODY OF CHILD: REPUDIATION OF AGREEMENT.** A father can, by his agreement in writing, surrender the custody of his infant child to another, so as to make the custody of that other legal, and he cannot thereafter repudiate such agreement and retain the custody of his child, unless he can show a clear breach of the agreement, or an abuse of the child, or that the best interest of the child requires it.
3. **——: CUSTODY OF CHILD: EVIDENCE.** Evidence examined, its substance stated in the opinion, and *held* that it is for the best interest of the child to remain in the custody of the respondents.

**APPEAL from the district court for Madison county:
ANSON A. WELCH, JUDGE. *Reversed and dismissed.***

*Allen & Dowling and Baldrige, De Bord & Fradenburg,
for appellants.*

H. Halderson and M. B. Foster, contra.

BARNES, J.

This was a proceeding in habeas corpus brought in the district court for Madison county by the relator, Edward Gunnarson, to recover the possession of his two minor children, Olga Gunnarson and Ellen M. Gunnarson. A trial resulted in an order giving the custody of Ellen M. Gunnarson to the relator, and remanding the custody of Olga to the respondents. From that judgment the respondents have brought the case to this court by an appeal.

It appears that the relator, on or about the 18th day of March, 1910, by an instrument in writing, duly signed and acknowledged before a notary public of Madison county, relinquished the care and custody of his two daughters to the respondents, who took them, without objection on his part, to Omaha, in Douglas county.

It is respondents' first contention that the action should have been commenced in Douglas county, and the district court for Madison county had no jurisdiction in this case to make the order of which the respondents complain. It is argued that the action should have been commenced in the county where the unlawful restraint took place, and some of the authorities seem to sustain that contention. Whether it may also be commenced in the county where the relator resides has not perhaps been determined by this court, but we deem it unnecessary to decide this question, for the reason that the judgment in this case can well be put upon another ground.

It appears that about five years before the commencement of this proceeding the wife of the relator died, leaving him with the two children in question, one of whom was about a year old, and the other some four years of age; that immediately after the death of his wife the relator placed the youngest child in the charge of a Mrs. Newman, residing in Newman Grove. The eldest girl, Olga, was placed in charge of one Eugene King, where she remained some four or five months, when she was also placed in the charge of Mrs. Newman. That for the period of about four

years the relator also lived in the Newman home. The treatment of the children was such as to cause comment among the neighbors, and in March, 1910, Gunnarson's brother and wife came on a visit to Newman Grove. They found such a condition existing that they notified the officers of the respondent that something ought to be done for the care of the children, and Mrs. Quivey, acting for the respondents, came to Newman Grove, and secured the relinquishment above mentioned, and, without objection on the relator's part, took the children to Omaha. They were afterwards placed in the home of Philip Nichols and Emma E. Nichols, his wife, and in the home of Robert A. Collier and Retta Collier, his wife, at or near the town of Campbell, in Franklin county, Nebraska. At the time the children were taken to Omaha the relator was living in the home of Mrs. Newman, whom, it is apparent from the record, in a few days thereafter he married, and thereupon he filed the application for a writ of habeas corpus to recover possession of the children.

The district court found that there was no fraud, false representations or undue influence used on the part of the respondents to obtain possession of the children. The finding of the court reads as follows: "The court further finds that said instruments (relinquishment papers) in writing were not obtained by fraud, false representations or undue influence on the part of the respondents, or any other person, and that the relator was persuaded to sign the same by persons acting in good faith, who believed that they were acting for the best interest of said children, without false representations on their part." The court, however, found that the instruments were voidable and subject to rescission by the relator, and that on the 19th day of March, 1910, the relator notified the persons in charge of the office of the respondents, the Nebraska Children's Home Society, that he desired to rescind the authority of said instruments purporting to convey to said Nebraska Children's Home Society the custody of the said children, and that he thereby rescinded and canceled his said agreements.

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It is a significant fact that the court further found that "the relator has not furnished, and is not able to furnish, proper parental care, custody and control of the said Olga Gunnarson, and is not entitled to the custody of said child." The court further found, however, that "the relator has been, and is able to furnish a home and proper parental control for the said child, Ellen M. Gunnarson, and is a proper person to have the custody of said child, and is entitled to her custody." There was a further finding by the court that "the Nebraska Children's Home Society is a suitable institution to have the control and custody of said children, and that said Robert A. Collier and Retta Collier are suitable persons to have the actual custody of said Ellen M. Gunnarson, and that said Philip Nichols and Emma E. Nichols are suitable persons to have the actual custody of said Olga Gunnarson." It is clear that the findings of the court are somewhat inconsistent.

The testimony shows that it was a matter of common knowledge that the relator lived with Mrs. Newman. He testified: "I lived there at Mrs. Newman's house three years before I signed exhibits A and B. When I was not at home, Mrs. Newman had charge of these little children."

A Mrs. Condrim testified, in substance, that she had lived at Newman Grove for about 18 years, and had known Mrs. Gunnarson, the mother of the two girls; that she lived across the corner of the block from Mrs. Newman. She said Mrs. Newman told her that she was a widow, and she testified in regard to a conversation she had with Mr. Gunnarson. In relation to this matter her testimony is as follows: "Well, I don't remember just how we started the talk. He said to me that the girls were not treated right. * * * And I said: 'Are you married to her (meaning Mrs. Newman)?' He said: No; he was not married. I said: 'Well, if you was a decent man you would not live there with your children if you were not married.' I says: 'Why don't you take them away?' He says: 'That is what I should do.' That is about all that was said."

Mr. Nelson, cashier of the bank at Newman Grove, who

knew the Gunnarsons well, testified, in substance, as follows: I had a talk with him after he sent the children to the respondents. I told him it was a pretty hard thing for a father to have to do. He mentioned something—he thought the children would be better off to have a home—something to that effect. People made remarks that relator and Mrs. Newman were not married. I was surprised to learn that they were not married, because I did not think it was quite the proper way for a man to live with his children. Don't know how long they lived there. Relator and Mrs. Newman did not get married until the girls had been sent away. This witness further testified that Gunnarson drank excessively, and that the children were whipped by Mrs. Newman when they lived with her; that the eldest child ran away from home on account of the treatment she had received.

A Mr. Juelson testified that, after the papers were signed, Gunnarson proposed that he get an officer to go along to the house to get the children. One was at home with Mrs. Newman, the other had run away, or had gone into the country some distance, the night before. Gunnarson seemed afraid to go. He said he knew there would be trouble if he went down. Mrs. Quivey went down. Mr. Gunnarson drove out to get the other child.

Mrs. Quivey testified that Gunnarson told her that he went home about 11 o'clock one night, and the children were both out of doors, and were not willing to go into the house, and that made him send for some one to take care of them. He said the younger girl had been treated well, but Mrs. Newman did not like the other one, and treated her cruelly. He said she had whipped her and had hurt her. He said the eldest girl had run away the night before.

Louis Pospicel testified, in substance, that he lived at Newman Grove; was 35 years old, and was a married man; was in the implement business; and lived about 300 or 400 feet from Mrs. Newman; that he knew the children; that he did not know whether Gunnarson was married

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to Mrs. Newman or not. He further testified: "I have noticed lots of times that they (referring to the children) were not treated right. Mrs. Newman slapped Olga. I heard lots of hollering between Mrs. Newman and Olga. Mrs. Newman was hollering. I did not know what she said. I know she whipped her with her hand."

Mrs. Pospicel testified: "The little girls did not have any home except Mrs. Newman's; if they had any other I would have known it. Yes; I saw Mrs. Newman whip these children. Yes; snow on the ground; she whipped both of them. She did not whip the little one as much as she whipped the oldest one. She whipped the oldest until she laid down in the snow and hollered. She said: 'Mamma, don't lick me any more.' I called to her. The children were screaming so much I guess she didn't hear me. Yes; it was Olga. She was lying in the snow. I don't know how many times she slapped her. I could not hear just what was said. The sun was going down. She hit her a good many times. She hit her when she was lying in the snow. I said to Mrs. Newman: 'What are you doing?' I went in, and did not see her any more. I have heard the children scream over from the house. I have heard it so many times I do not know." On cross-examination the witness testified: "I do not know what Mrs. Newman whipped the girls for that day. No; I didn't see Olga shortly after the whipping, nor for some time later. I don't know whether there were any marks on the girl from this whipping."

Mr. Gutru, who is in the hardware business at Newman Grove, testified in regard to the treatment of the children. He said: "I knew the little girls quite a long time before they were sent away. They came to my house and got in with my children. As I understand it, they had been driven out of the house. My wife tried to send the children home when supper time came, but she couldn't get rid of them. She called me up at the store, and wanted me to look after the children and get them away, because she didn't want to get into any trouble, so I set out to find

Mr. Gunnarson, and took him down and asked him to go and get the girl. * * * He said he would, and started off. Some other gentlemen informed me that Gunnarson went down and inquired, and said he would punish the girl, so I started right home. I didn't want any trouble at my place. * * * We talked a little while, and he said, 'We had better get the girl and take her home,' and we found the girl had lit out—had gone out the back door, and was gone. I don't know where she went to. * * * Well, I can't say that he was particularly under the influence of liquor. I know that he is in the habit of getting drunk very often. One day the two girls came with my girl from the schoolhouse, and would not go home. They wanted my girls to go home with them, and said, 'They will not whip me if you go with us.' * * * The same day my children went up town to find Gunnarson; and they had walked around on the streets, and Mr. Gunnarson and the two children came into the store. They stopped there, and we got to talking of the girl. * * * Mrs. Newman had accused her of telling lies, and that she had punished Olga and whipped her, and washed her mouth to wash the lies out of her mouth. Gunnarson said he couldn't be there. He said they were whipped or mistreated, and he said that is too bad that they were treated that way. He says, as near as I remember, that they tell lies, or something like that, and he knew that was one of the punishments they received for telling lies." Testifying of Gunnarson's general reputation in the community, he stated: "He is in the habit of getting drunk. I would not say that he is the worst drinker in Newman Grove * * * is right with the drinkers. Olga didn't tell that she was punished by putting soap in her mouth at my house. She told it out in the street before Mr. Gunnarson and myself. I had very good reason to believe it. The girl cried, and didn't dare to go home. * * * We had quite a little talk with Gunnarson about this matter. He seemed to be in trouble himself to know where to take the children. He was apparently afraid to take them

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home himself. No; I didn't talk with him about a plan, for I didn't know of any plan, * * * to take care of them."

John Juelson, a reputable business man of Newman Grove, testified that he knew the people very well; that Gunnarson's general reputation in the neighborhood was that he drank pretty hard.

Lillian McClelland testified for the respondents that she was at the Children's Home Society when Gunnarson came to see about reclaiming his children. Her testimony, in substance, is as follows: "When he came there I was alone. I should say he was intoxicated. Yes; I have seen enough of intoxicated men to know when they are intoxicated. I had a talk with him with reference to the children. He said he came to see Mrs. Quivey. I told him Mrs. Quivey was out of the city, and would not be able to see him before the first of the following week. He said he had a letter from Mr. Quivey that he had written. I said: 'Why did you give your children up, if you wanted to have them back again?' He said he didn't really want to give them up, but he had been living with Mrs. Newman for five years. He said he did not believe it was the right place for the children, but he wanted them back." On cross-examination she testified: "It was about 2 o'clock in the afternoon that Gunnarson appeared at the office. Yes, sir; he must have come directly from the depot to the office. Yes; he was drunk. Well, he lay over the register and vomited; acted as much like a drunk man as I ever saw. I never saw him but twice; that is all I know about his drinking."

Miss Carrie Stewart testified, in substance, as follows: "I don't think I ever was at Newman Grove before that case came up. It was in my judgment a case that required attention. Yes; I have seen Mr. Gunnarson. First about January 6, 1910, at Newman Grove on a coach attached to the freight train. He came in and sat down just back of me. From his remarks I judged he was intoxicated. Shortly after I took my seat in the car, Mr. Gunnarson

came on with two little girls; was sitting just back of me, and they sat there for a short time. He seemed to be so much intoxicated that he could scarcely resist Mrs. Newman, and she took the two little girls and got off the train and went across the railroad track. She was scolding the eldest girl."

There is considerable other testimony in the record showing, or tending to show, that Gunnarson was a man addicted to the use of intoxicating liquors. It seems clear from the testimony that Gunnarson himself knew that his children had been cruelly treated by the woman he was living with. It also seems clear that she had no affection for the children of Gunnarson's first wife; that her conduct towards them drove them away from home; that they were subjected to frequent punishment in the way of whippings. If she would do this while the children were living there, before they were taken in charge by the respondents, it is fair to assume that she would continue this cruel treatment in case they were returned to the custody of the father.

A father can, by agreement, surrender the custody of his infant children to another, so as to make the custody of that other legal, and he cannot thereafter repudiate such agreement and retain the custody of the children, unless he can show a clear breach of the agreement, or an abuse of the child, or that the best interest of the child requires it. *Cunningham v. Barnes*, 37 W. Va. 746; *Anderson v. Young*, 54 S. Car. 388.

In *Clark v. Bayer*, 32 Ohio St. 299, it was said: "It sometimes happens that parents have abandoned their minor children, or by act and word transferred their custody to another. In such cases, where the custodian is, in every way, a proper person to have the care, training, and education of the infant, and the court is satisfied its social, moral, and educational interests will be best promoted by remaining in the custody of the person to whom it was transferred, or received, when abandoned, the new custody will be treated as lawful and exclusive."

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In *Bonnett v. Bonnett*, 61 Ia. 199, it was said: "The weight of authority, we think, sustains the position that a parent can by agreement surrender the custody of his child, so as to make the custody of him to whom he surrenders it legal."

In view of the finding of the trial court that Robert A. Collier and Retta Collier are suitable persons to have the actual custody of Ellen M. Gunnarson, we see no reason why that custody should be transferred again to the father, who voluntarily relinquished it. It has always been held by this court that the interests of the child should be taken into consideration in determining its custody. *In re Burdick*, 91 Neb. 639; *State v. Porter*, 78 Neb. 811; *In re White*, 33 Neb. 812. As we view the record, it is apparent that it is for the best interest of Ellen M. Gunnarson that she remain in the custody of Robert Collier and Retta Collier until such time as it is shown that a change of custody will materially promote the child's welfare, morally and physically.

The judgment of the district court, so far as the care, custody and control of the child Ellen is concerned, is therefore reversed, and the proceeding is dismissed.

REVERSED AND DISMISSED.

REENE, C. J., LETTON and FAWCETT, JJ., not sitting.

LARDNER HOWELL, APPELLEE, v. CORNELIUS JORDAN,
APPELLANT.

FILED SEPTEMBER 26, 1913. No. 17,336.

1. **Tax Sale: VALIDITY: NOTICE OF REDEMPTION.** Notice of the expiration of the time for redemption of real estate from tax sale must be served on the person in whose name the land was assessed; and there must be personal service of the notice, or a showing that such service cannot be had, in which case service

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may be made by publication. A failure to serve such notice, or show the necessity for service by publication, renders the subsequent proceedings void.

2. ———: REDEMPTION: TENDER. Tender by the owner to the county treasurer of the payment of an amount sufficient to redeem the land from tax sale, such tender being refused, is a sufficient compliance with the statute providing for payment of all taxes due to enable the owner to maintain an action for redemption of his land from tax sale.

APPEAL from the district court for Sioux county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Michael J. O'Connell, Allen G. Fisher and William P. Rooney, for appellant.

Albert W. Crites, contra.

BARNES, J.

Action to redeem a quarter section of land situated in Sioux county, Nebraska, from a sale for taxes, and to quiet the title of the plaintiff thereto. A trial in the district court resulted in a judgment for the plaintiff, and the defendant has appealed.

The record discloses that on the 2d day of November, 1902, the entire quarter section of land in question was sold to one Grant Guthrie for the delinquent taxes of 1901, amounting to the sum of \$3.93; that notice of the time of expiration for redemption was published in the Harrison Sun, a newspaper published and in general circulation in Sioux county, commencing on the 15th day of July, and ending on the 29th day of that month, in the year 1904; that on the 14th day of November of that year a treasurer's tax deed was issued to the said Grant Guthrie, who thereupon conveyed the land by quitclaim deed to the defendant, Cornelius Jordan, who claimed to be the owner thereof under the quitclaim deed above mentioned.

It appears that the published notice was the only notice given of the expiration of the time for redemption; that the land was taxed in the name of William A. Pat-

zowsky, and the title was in one W. H. Carnahan, receiver of the McKinley-Lanning Loan & Trust Company, and his deed was recorded on the 3d day of June, 1903, in the deed records of Sioux county. The statute providing for notice of the expiration of the time for redemption was construed in *Thomsen v. Dickey*, 42 Neb. 314, and it was there held that the notice must be served upon the person in whose name the land was assessed. There is no showing that personal service of the expiration of the time for redemption could not be served upon Patzowsky, or some person in possession of the land. The record discloses that no notice other than by publication was served upon Patzowsky, and it is not shown that personal service could not have been made upon him. For this, and other reasons, it appears that the notice was defective, and conferred no authority on the treasurer to execute the tax deed in question.

Again, it appears that the entire 160 acres of land was sold for the paltry sum of \$3.93, and it does not seem at all probable that no one would have purchased a less amount of the land for that sum. When it is sought to divest the owner of his land by a tax deed, it has always been held by this court that the provisions of the statute must be strictly complied with, for such provisions are mandatory. *State v. Gayhart*, 34 Neb. 192; *Jones v. Duras*, 14 Neb. 40; *Peck v. Garfield County*, 88 Neb. 635. It therefore follows that the tax deed was void.

It is contended that there was no showing on the part of the plaintiff that he had paid all of the taxes due upon the land, and therefore he was not entitled to a decree in his favor. It appears, however, that the plaintiff had tendered payment of all of the taxes due several times to the county treasurer, who had refused to accept such payment. The plaintiff could not do more, and therefore this contention cannot be sustained.

Finally, it appears that there was an accounting of the amount necessary to redeem, and the court found that sum to be \$36.50. This sum of money the plaintiff was re-

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quired to pay in order to redeem the land from the tax sale, and that amount was paid into court for the benefit of the defendant.

It follows that the judgment of the district court was right, and is

AFFIRMED.

REESE, C. J., LETTON and FAWCETT, JJ., not sitting.

ONN LUMBER & SHINGLE COMPANY, APPELLANT, v. POWELL
LUMBER COMPANY ET AL., APPELLEES.

FILED SEPTEMBER 26, 1913. No. 17,340.

Estoppel in Pais. To create an estoppel *in pais*, it must appear that the party against whom it is invoked made the declaration or did the act, on which the estoppel is sought to be based, either with the express intention to deceive, or acted with such careless and culpable negligence as to amount to a constructive fraud.

APPEAL from the district court for Jefferson county:
LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

F. N. Prout and T. A. Witten, for appellant.

C. C. Flansburg and C. H. Denney, contra.

BARNES, J.

Action to recover the purchase price of a car-load of shingles. A trial in the district court for Jefferson county resulted in a judgment for the defendants, Delmar D. Norton and Isaac J. Elwood, and the plaintiff has brought the case to this court on appeal.

The record discloses that for some years prior to the 17th day of February, 1910, the defendant Delmar D. Norton was the owner of a lumber yard in the village of Powell, Jefferson county, which was in charge of an agent

by the name of Frisch, who carried on the business under the name of the "Powell Lumber Company;" that on that date he sold the yard in question to the defendant Elwood, giving him a deed to the real estate, and executing to him a bill of sale of the stock of lumber; that Elwood on the same day sold the yard to W. L. Parker and Edgar A. Foster, who at that time took possession of the yard and business; that thereafter, and on or about the 10th day of March, 1910, Parker and Foster ordered the car-load of shingles in question from the plaintiff, who shortly before that time succeeded to the business of the Derickson Lumber Company of Seattle, Washington. The order was by mail, and made by defendants Parker and Foster, under the name of the Powell Lumber Company, the order having been signed by a rubber stamp; the letter-head used in mailing the order did not contain the name of either Norton or Elwood. The car-load of shingles was shipped upon this order. The shipment never came to Powell, but was diverted in transit to the Panhandle Lumber Company of Canadian, Texas, and it was sought to hold defendants Norton and Elwood on the ground of an estoppel.

It was not claimed that plaintiff had ever, at any time before the shipment in question was made, sold either to Norton or Elwood any lumber, or had any dealings with the Powell Lumber Company. It is claimed, however, that before it made the shipment it had examined a "Red Book" (the date of which is not given), used by the trade, and had ascertained that the defendant Norton was worthy of credit, and therefore made the shipment in question. It is not claimed that the plaintiff made any other or further investigation, or that it ever had any dealings or correspondence with either Norton or Elwood, or the Powell Lumber Company, except to fill the order in question. The district court held that there was no estoppel, and that, as to the defendants Elwood and Norton, plaintiff was not entitled to recover.

In order to create an estoppel *in pais*, it must appear that the party against whom it is invoked made the dec-

laration or did the act, upon which estoppel is sought to be based, either with the express intention to deceive, or with such careless and culpable negligence as to amount to a constructive fraud. *Griffeth v. Brown*, 76 Cal. 260.

It appears that, when the order in question was made, neither Norton nor Elwood was interested in any manner in the Powell Lumber Company. Norton had sold and conveyed the entire business to Elwood on the 17th day of February, 1910, and thereafter had no interest in the Powell Lumber Company. Elwood had sold and conveyed the property to Parker and Foster on the same day, and therefore had no interest in the company. There had been no course of dealings between the plaintiff and the Powell Lumber Company, and there was nothing on which to base an estoppel as against Norton or Elwood. It does not appear that either Norton or Elwood had any knowledge or intimation that it was the purpose of the defendants Parker and Foster to continue the business under the trade-name of the Powell Lumber Company, and, as we view the record, there is nothing in the evidence to create an estoppel as against either of them.

There was a special appearance by the appellees, which was kept good, and it is claimed by them that the district court for Jefferson county never acquired jurisdiction over them, or either of them. It is not necessary to determine that question, for the reason that the plaintiff has failed to establish any liability on the part of the appellees.

The judgment of the district court is therefore

AFFIRMED.

REESE, C. J., LETTON and FAWCETT, JJ., not sitting.

CORA CAROLINE COLMAN, APPELLEE, v. ALBERT LOEPER,
APPELLANT.

FILED SEPTEMBER 26, 1913. No. 17,351.

1. **Intoxicating Liquors: ACTION FOR DAMAGES: LIMITATIONS.** Where it is shown that an unlicensed seller of intoxicating liquors has sold such liquors to one who has become an habitual drunkard, within four years next before the commencement of an action brought by his wife to recover damages for the loss of support, a plea of the statute of limitations is not available as a defense.
2. ———: ———: **RECOVERY.** In such a case, where the disability is permanent, the injury is a continuing one, and recovery may be had for the whole period of the disability.
3. ———: ———: **DEFENSES.** The fact that the wife consented to or acquiesced in the sale or gift of intoxicating liquors to the husband is no defense or bar to an action for damages by the wife, and in behalf of the minor children, for loss of means of support through the disability or disqualification of the husband for labor caused by drinking the intoxicating liquors. *Gran v. Houston*, 45 Neb. 813.
4. ———: **SALES: CIRCUMSTANTIAL EVIDENCE.** The sale of intoxicating liquors, like any other fact, may be proved by circumstantial evidence; and it is not error to receive the testimony of a station agent, who had delivered some 32,000 pounds of bottled goods labeled "mineral water" to the defendant, that in his opinion the goods were intoxicating liquors.
5. ———: **ACTION FOR DAMAGES: WITNESSES: CROSS-EXAMINATION.** Where, on the trial of an action for damages caused by the sale of intoxicating liquors to an habitual drunkard, the defendant has introduced evidence to show that he is the owner of a small amount of property, it is not error to permit the plaintiff to pursue that inquiry upon cross-examination, and show that the defendant was possessed of a farm worth about \$8,000.
6. ———: ———: **VERDICT.** Evidence examined, and held that a verdict for \$5,516.70 was not excessive.

APPEAL from the district court for Gage county:
LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

L. W. Colby, for appellant.

Hugh J. Dobbs, contra.

BARNES, J.

Action against an unlicensed seller of intoxicating liquors, brought by Cora Caroline Colman, for herself and her two minor children, to recover for the loss of support occasioned by the debauched and drunken condition of the husband and father, Harry D. Colman. A trial in the district court for Gage county resulted in a verdict and judgment for the plaintiff. The defendant has appealed, and his first contention is that a part of the damages claimed were barred by the statute of limitations.

It appears that plaintiff and her husband were married in 1894, and at that time he was a sober and industrious man; that for some six years thereafter he was able to and did earn about \$1,000 a year, which he contributed to the support of his wife and children; that in the year 1900 he commenced to obtain intoxicating liquor from the defendant, and gradually became addicted to its excessive use, until the year 1906, when plaintiff induced him to take what is called the "Keeley Cure"; that when Colman returned from that institution he was sober and industrious, and resumed his occupation as a carpenter and farmer, and remained in that condition until the 4th of July, 1907, when he again obtained intoxicating liquor from the defendant, which he drank to excess; that he obtained such liquors from the defendant frequently, and again became an habitual drunkard, and was totally unable to support the plaintiff and his children; that he continued in the excessive use of intoxicating liquors until eventually he threatened to kill his wife and children, and they were compelled to flee from him and take up their abode elsewhere. In March, 1909, the plaintiff brought this action, and it appears that, owing to the debauched condition of her husband, she obtained a divorce from him on or about the 1st of June, 1909; that the husband continued to use intoxicating liquors until he died.

The defendant filed a motion to compel the plaintiff to separately state and number her several causes of action.

The motion was overruled, and the defendant filed an answer, in which he interposed a plea of the statute of limitations as to all sales of liquor which occurred prior to March 10, 1905, and on the trial the defendant requested an instruction to that effect, which was refused, and the court instructed the jury, upon his own motion, as follows:

"Instruction No. 4. If you find from the evidence at the time plaintiff married the said Harry D. Colman, and for some years thereafter, he was a sober and industrious man, was able to, and who did, earn money which he applied to the support of plaintiff and her children, and that afterwards the said Harry D. Colman became a drunkard, and by reason thereof failed to support plaintiff and her said children as well as he would have done had he not become a drunkard, and that defendant, Albert Loeper, at any time within four years prior to March 10, 1909, sold or gave to said Harry D. Colman any intoxicating liquor or liquors, which either caused, or contributed to, his said drunkenness, then plaintiff is entitled to a verdict against the defendant for the amount of damages which you find from the evidence she has sustained by reason of the drunkenness of said Harry D. Colman."

The question on this phase of the case is: Did the trial court err in refusing to treat the appellee's cause of action as separable? This action is not for a partial loss of support during any severable period of time embraced in the petition. It is an action for the total destruction of the means of support which would have been afforded the plaintiff and her children but for the wrongful and illegal sales of intoxicating liquors by the appellant to her husband through a long series of years. It is the ultimate and final result of such sales, namely, the total and permanent disqualification of her husband to support his family, that constitutes the plaintiff's cause of action. Such a cause of action is single and individual.

After reciting her marriage to Harry D. Colman in 1894, the petition alleges that, during all the times covered by her grievance, her said husband with herself and

children constituted one family; that she and her minor children were wholly dependent upon him for their maintenance and support. It is alleged that, during all the time mentioned in her said petition, defendant Loeper was engaged in the sale of intoxicating liquor at his residence in Gage county, Nebraska, without having ever been licensed to deal in alcoholic drinks; that during the years 1900, 1901, 1902, 1903, 1904, and 1905, and a part of 1906, her husband was transformed by the appellant from an absolutely sober, healthy and industrious man to a common drunkard, so that by July of the last named year he was in a condition of almost continuous inebriety; that during the month of July of that year he was placed in a Keeley Cure, and treated for six weeks for alcoholism; that on his return from said institution, and after taking such treatment, the defendant Loeper, well knowing that he had been under treatment at said institution, continued to ply him with intoxicating liquors, and to sell the same to him, beginning about July 1, 1907, and on the 4th day of July, 1907, to the date of the commencement of this suit, the plaintiff's husband lapsed again into the habitual and excessive use of alcoholic liquors as a beverage, such liquors having been furnished and supplied to him by the defendant, whereby he was rendered incapable of providing suitable support and maintenance for plaintiff and her children, and did utterly fail to provide such support and maintenance, and after a prolonged debauch for many years prior to the 20th day of February, 1909, plaintiff, believing that her own life and the lives of her children were endangered by the drunken and incapable condition of her said husband, fled from home with her children, and has not since lived with her said husband.

There is no hint in the language of this petition that the appellant considered her cause of action as anything else than the total disqualification of her husband to support herself and children. The contention of the appellant founded upon the theory of partial failure of

support is negated by the averments of the plaintiff's petition and the evidence offered in support of it.

In *Pilkins v. Hans*, 87 Neb. 7, we held: "In an action against licensed saloon-keepers for damages arising from the sale of liquors to plaintiff's husband causing his death, it is proper to allege and prove that for some time immediately prior to the day of the death of the deceased the defendants had sold liquors to the deceased and had thereby caused him to become an habitual drunkard."

In *Stahnka v. Kreitle*, 66 Neb. 829, the sales by some of the defendants to the husband, an habitual drunkard, had extended through a greater portion of five years, and the judgment was affirmed. The court held that those defendants, who during the entire period of time had contributed to the formation of the habit, were liable for the resulting continued course of dissipation on the part of the husband.

In *Jessen v. Willhite*, 74 Neb. 608, it was held that one selling liquors is liable, not only for the actual results of the sale, but for all damages growing out of the disqualification resulting from or contributed to by such sale, without reference to the time through which such disqualification may continue.

The obvious meaning of the law is that, when a cause of action has once accrued under the civil damage provisions of the Slocumb act in favor of the wife against the liquor dealer for damages to her means of support arising from the sale of intoxicating liquors to her husband, whereby he has become an habitual drunkard and incapable of supporting his family, the injury is a continuing one, and the wife may recover for all future loss from the moment the cause of action arose, no matter what the quantum of the disqualification may be, and without regard to the length of time through which it may continue to run. It seems clear that the cause of action is not barred by the statute of limitations if a suit is brought within four years after the defendant has ceased to supply the husband with intoxicating liquor.

We are therefore of opinion that the instruction given by the court upon its own motion was as favorable to defendant as he was entitled to, and the instructions as to the statute of limitations tendered by the defendant were properly refused.

The defendant contends that the court erred in refusing to give instructions numbered 2 and 3, at his request. By instruction No. 2 the jury were told, in substance, that if they found from the evidence that the plaintiff voluntarily consented to, or contributed to, the intoxication of her husband by furnishing to him money to purchase intoxicating liquors from the defendant from which the plaintiff's husband became intoxicated, or if she assented to the sale of intoxicating liquors to her husband by the defendant by which liquor her husband became intoxicated, then in that case the plaintiff could not recover. By instruction No. 3 the jury were told that if they found from the evidence that the plaintiff voluntarily contributed money to her husband for the purchase of intoxicating liquors, or if plaintiff gave permission to the defendant to supply her husband with all the intoxicating liquors that he wanted, that plaintiff's husband became intoxicated by the use of said liquors so sold by the defendant, and became sick and neglected his business by reason thereof, those facts were proper to be considered by the jury on the question of damages. The question presented by these instructions is no longer an open one in this state. *Wardell v. McConnell*, 23 Neb. 152; *Gran v. Houston*, 45 Neb. 813; *Jessen v. Willhite*, 74 Neb. 608; *Kliment v. Corcoran*, 51 Neb. 142. In the case last cited it was said: "But whatever view we might feel constrained to adopt of the subject as an original proposition, the question is certainly not now an open one in this jurisdiction. In *Buckmaster v. McElroy*, 20 Neb. 557, the voluntary purchaser of intoxicating liquor was held to be within the protection of the statute providing that 'the person so licensed shall pay all damages that the community or individuals may sustain in consequence

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of such traffic,' etc. The doctrine of that case was reasserted in *Curtin v. Atkinson*, 36 Neb. 110, and in *Gran v. Houston*, 45 Neb. 813, was applied to a state of facts in all essential respects identical with those here presented." It follows that the instructions were rightly refused.

Exception is taken to the giving of instruction No. 8, by the court upon his own motion. By that instruction the jury were informed: "In determining the amount of damages to which the plaintiff is entitled, if you find her entitled to damages, you will take into consideration the amount of support received by plaintiff from the said Harry D. Colman under the decree of divorce which she obtained from him, as shown by the evidence in this case, and make the amount you allow her personally that much less than it would be if she had not received anything from said Harry D. Colman by reason of said decree of divorce; but you will not deduct anything from the amount you allow for the support of the children, except the \$30 which the evidence shows has been paid by said Harry D. Colman for their support, pursuant to the decree in said divorce cause."

It appears that after this action was commenced Colman's condition was so bad that the plaintiff was compelled to prosecute a suit for divorce against him; that in that action she was awarded a small amount of alimony, and provision was made for the support of the children. That decree was introduced in evidence, and the amount of alimony actually paid on the decree, together with the amount paid for the support of the children, was shown, and the court instructed the jury to deduct from the damages, if they found in favor of the plaintiff, the amount paid upon the decree. Of this defendant had no right to complain, and if the giving of this instruction was error it was error without prejudice, so far as his rights were concerned.

Complaint is made of the reception of the evidence of Alex T. Watson. This witness was the station agent of

the Burlington railroad at Diller, and his deposition shows that during the year 1906, the year 1907, and part of the year 1908, the defendant caused to be shipped to himself at Diller station, alone, from wholesale liquor houses in St. Joseph, Missouri, some 32,000 pounds of bottled goods, for which he receipted to the company as "mineral water," and which he hauled away. This evidence was introduced for the purpose of showing that the defendant, who was not a licensed saloon-keeper, was engaged in the sale of intoxicating liquors. Up to the time this testimony was introduced it had been strenuously denied by the defendant that he had sold any intoxicating liquors to Harry D. Colman, and this testimony was introduced for the purpose of showing that he had in his possession intoxicating liquors for sale, and incidentally to show that he had sold them to Harry D. Colman. The witness testified to the facts upon which he based his opinion, and it was those facts which tended to prove that defendant was an unlicensed seller of intoxicating liquors.

The sale of intoxicating liquors may be proved, like any other fact, by circumstantial evidence, and the testimony complained of was plainly introduced for that purpose. *Curran v. Percival*, 21 Neb. 434; *Dolan v. McLaughlin*, 48 Neb. 842; *McManigal v. Seaton*, 23 Neb. 549; *Pilkins v. Hans*, 87 Neb. 7. It is true that the witness testified that in his opinion the goods so received by the defendant as "mineral water" were in fact intoxicating liquors. The opinion of the witness was, of course, in itself no evidence upon which the jury could act, and must under some circumstances be so prejudicial as to require a reversal. In this case, however, the witness stated fully the facts from which the conclusion was drawn that the "bottled goods" were in fact intoxicating liquors, and the whole evidence is so conclusive upon this point that we cannot find that the defendant was prejudiced by the admission of the opinion of the witness.

It is also contended that the court erred in receiving

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evidence of the fact that defendant was the owner of a farm worth about \$8,000. It is a sufficient answer to this contention to say that it appears from the record that defendant opened up that question by his own testimony, and, having introduced evidence to show that he was worth a very small amount, the plaintiff was entitled to pursue that inquiry.

Finally, it is claimed that the verdict was excessive, and was not supported by the evidence, and was due to the passion and prejudice of the jury. The jury, responding to the issues and the proofs in the case, by its verdict, found that the husband, through his habitual drunkenness at the time this action was commenced, was permanently disqualified from supporting his family, and assessed the damages accordingly. By section 11 of the act relating to the sale of intoxicating liquors, it is provided that all persons who shall sell or give away upon any pretext, malt, spirituous or vinous liquors, or other intoxicating drinks, without first having complied with the provisions of this act, and obtained a license as herein set forth, shall, for each offense, be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than \$100 nor more than \$500, or be imprisoned not more than one month in the county jail, and shall be liable in all respects to the public and to individuals, the same as he would have been had he given bond and obtained license as herein provided. The effect of this provision is to place all dealers in intoxicating liquors on exactly the same footing with respect to damages occasioned by the traffic in intoxicants. A suit may be brought against individuals for the recovery of damages growing out of such traffic, whether licensed saloon-keepers or not.

In *Young v. Beveridge*, 81 Neb. 180, it was held that under the foregoing provisions of law the measure of damages recoverable by the widow against a saloon-keeper is the present value of the sum that the husband would have contributed to her during their joint expect-

ancy, and the amount recoverable by a minor child is the value of the support the father would have contributed to her support during her minority.

In the case of *Warrick v. Rounds*, 17 Neb. 411, it was said: "Questions of fact, and upon conflicting testimony, are to be decided by the trial jury, and a verdict will not be set aside on the ground of a want of sufficient evidence to support it, unless the want is so great as to show that the verdict is manifestly wrong."

Persons engaged in selling intoxicating liquors under license obtained pursuant to the laws of this state are liable in damages for all legitimate and approximate consequences of their traffic, and, if they have induced habitual drunkenness in a previously sober and industrious man, they are liable for a consequent thriftless, dissipated career followed by him after they have ceased to furnish him with liquor.

In *Jessen v. Willhite*, *supra*, it was said: "(1) One selling intoxicating liquor is liable, not only for the actual results of the sale, but for all damages growing out of the disqualification resulting from or contributed to by such sale, without reference to the time through which such disqualification may continue. (2) Where a husband becomes an habitual drunkard, and abandons his family and ceases to provide for its support, whether such loss of support is permanent or otherwise is a question of fact for the jury."

Acken v. Tinglehoff, 83 Neb. 296, was a case where a man 28 years of age, strong and able-bodied, capable of earning \$700 a year, was killed by a train while intoxicated from liquors sold to him by the defendant saloon-keepers. It was held that a verdict of \$4,500 in favor of his wife and children was not excessive.

In *Jessen v. Willhite*, *supra*, a verdict for \$4,000 was sustained. In that case the husband furnished only \$50 or \$60 a month for the support of his family, and prior to the trial he had abandoned them.

In *Gran v. Houston*, *supra*, a verdict of \$5,000 was

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sustained. In *Scott v. Chope*, 33 Neb. 41, a verdict of \$7,000 was affirmed as not being excessive, in the case of a man 24 years of age, whose earnings amounted to about \$600 per annum.

In the case at bar, the husband at the time of the trial was 42 years of age, with an expectancy of something over 25 years, and the plaintiff's expectancy of life was much greater. The minor children were aged 13 and 15 years, respectively. Before the husband became an habitual drunkard, he was capable of earning, and did earn and contribute to the support of his family, the sum of about \$1,000 a year, and the jury might well have considered that he would have contributed much more than \$5,516.70, the amount of the verdict in this case, in the 25 years of his expectancy, to the support of his wife, and the support of his children during their minority.

There is no error in the record of which the defendant can justly complain. It is apparent that he had no defense to this action, and the only question for the consideration of the jury was the amount of the plaintiff's damages. In the light of all of the evidence contained in the record, it cannot be said that the verdict of the jury was excessive.

The judgment of the district court is therefore

AFFIRMED.

REESE, C. J., LETTON and FAWCETT, JJ., not sitting.

IN RE ESTATE OF JANE E. DOUGLASS.

WILLIAM ROYER ET AL., APPELLEES, v. JEFFERSON T. POTTER ET AL., APPELLEES, THOMAS DORSEY BEALL, APPELLANT.

FILED SEPTEMBER 26, 1913. No. 18,008.

1. **Wills; BEQUEST:** "PUBLIC CHARITY." A gift by will of the income of certain shares of bank stock of the First National Bank to the

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First Congregational Church Society of Seward, Nebraska, is a donation to a public charity.

2. ———: ———: TRUSTEES. The officers of the bank, where they are designated for that purpose, may hold the title to said bank stock as trustees, and pay the dividends accruing to said stock to the church for religious purposes.
3. ———: DEVISE: CHARACTER OF ESTATE. A gift by will of the parsonage, together with the lots upon which it is situated, to such church society so long as it is used for a parsonage, etc., is a donation to a public charity, and vests the church with a base fee to said lots, terminable upon an event that may or may not happen, and, until the happening of the contingency or event, the trustees or governing body of the church may hold and use the property for the purpose for which it was donated.

APPEAL from the district court for Seward county:
EDWARD E. GOOD, JUDGE. *Affirmed.*

Green, Breckenridge, Gurley & Woodrough, for appellant.

T. L. Norval, J. J. Thomas and R. S. Norval, contra.

BARNES, J.

Action by the executors to obtain a construction of the will of the late Jane E. Douglass. The findings and judgment of the district court for Seward county were in favor of the contentions of the executors, and Thomas Dorsey Beall, one of the collateral heirs, has appealed.

It appears that Jane E. Douglass, late a resident of Seward, Nebraska, by her will, which has been duly admitted to probate, in items 9 and 10 of that document, provided as follows:

Item 9. "I give, grant, devise and bequeath to the First Congregational Church Society of Seward, Nebraska, * * * the income derived from sixty shares of bank stock in the First National Bank of Seward, Nebraska; * * * and I direct the officers of said bank to hold said principal amount of said bank stock in trust for the benefit of said church; * * * and I direct said

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officers of said bank to pay to the treasurer of said church society one-twelfth of said annual income of said bank stock on the first day of each month."

Item 10. "I hereby give, grant, devise and bequeath to the First Congregational Church of Seward, Nebraska, the west seventy-five feet of lots numbered 7, 10 and 11, respectively, in block numbered 2 of the original town, now city, of Seward, Nebraska, to be used by said church society as a parsonage so long as said church shall remain the First Congregational Church or Church Society of Seward, and shall not unite with any other church or churches, save and except the United Brethren or Protestant Methodist Church or Churches, and so long as said society shall keep same well and reasonably repaired, and shall seasonably and regularly pay all necessary insurance and all taxes and assessments lawfully levied thereon, and shall not ever directly or indirectly employ, hire or engage Reverend F. W. Leavitt as pastor or minister in said church, or in any other capacity, after my death. If, however, any of the above conditions are not complied with, or should this bequest for any other reason fail to be carried out as herein provided, I hereby direct that said parsonage and premises revert to my separate estate, be sold at public sale, and the proceeds thereof be divided among the heirs and legatees mentioned and described in item 16 of this my last will and testament." There was a similar provision attached to item 9.

The first question to be determined is: Are the gifts above mentioned donated to a public charity? For upon this question will depend the correctness of the findings and judgment of the trial court.

In *St. James Orphan Asylum v. Shelby*, 60 Neb. 796, this court held that, under the common law, the English courts of chancery exercised inherent judicial power over charities anterior to, and independent of, the statute of 43 Elizabeth, and that the doctrine of charitable uses as administered as part of the common law jurisdiction of the courts of chancery exercising judicial power has been

transplanted in this state, and become a part of the jurisprudence of courts possessing common law equity powers. In the opinion in that case, Judge HOLCOMB, speaking for the court, said: "After discussing a number of cases decided by the chancery courts of England, and expressing the opinion that the jurisdiction under which that court acted belonged to it in the exercise of its judicial powers independent of the statute of 43 Elizabeth, the author further says: 'In some of these cases the charities were not only of an uncertain and indefinite nature, but, as far as I can gather from the imperfect statement in the printed records, they were also cases where there were no trustees appointed, or the trustees were not competent to take.'" In that case the terms of the will under consideration gave to the trustee power to apply the property and the proceeds of the same and the sale thereof to some particular and definite charity according to the judgment of the trustee, once and for all, after which the trustee and his duties and powers in the premises should cease and terminate, the trust having been fully discharged. In disposing of the question there presented, it was said: "This contract, like all others, must be construed with a view of carrying out the intention of the testator, and unless there is something in it contrary to the laws of the state, or in contravention of public policy, no reason exists for declaring it invalid. The object of the trust is clearly charitable, and is specified as such in so many words. A trustee is named, and is empowered by the testator to select for him, and as an expression of his will, a charity upon which the property in controversy is to be bestowed. The trustee has accepted the trust. He is willing to carry out its provisions, and has attempted to do so. He stands ready to make certain the very matter of uncertainty upon which contestant relies for a judgment. The will is for an object which has always been looked upon with favor by the courts. It is one of the most worthy of all bequests, save perhaps near kindred, having, by reason of their kinship,

peculiar claims to the consideration of a testator in the distribution of his property. The bequest is sanctioned by law and contravenes no public policy. Its invalidity can be declared only by the adoption of a doctrine at variance with the great weight of authority, to wit, that the beneficiaries shall be so certain that they may come into court claiming the benefits of the trust, and demand its execution. We do not think this doctrine should be adopted in this state, and hence hold to the view that where a bequest for a charitable purpose, though entirely general and uncertain in its character, is made to a trustee who is empowered to select the object of the charity, and who is willing to or has accepted the trust, the will will not be declared invalid because of the general nature of the object or objects of the charity." It may be stated, in passing, that the trustees mentioned in item 9 of the will under consideration have certified in writing their acceptance of the trust.

In *St. James Orphan Asylum v. Shelby, supra*, the gift was in the most general terms that the proceeds be applied to some charity; but the testator preferred the same to be applied to an establishment or maintenance of an orphanage. The will in the case at bar is much more specific, for it directs the dividends of the stock to be paid to the First Congregational Church, an institution of which the testatrix had been a member since its organization. Webster defines the word "church" as a body of Christian believers holding the same creed, observing the same rights and acknowledging the same ecclesiastical authority. The terms "church" and "society" are used to express the same thing, namely, a religious body organized to sustain public worship. The term "church" imports an organization for religious purposes. And a gift to a church without restriction as to the use to be made of the property is a charitable purpose.

In *McAlister v. Burgess*, 161 Mass. 269, 24 L. R. A. 158, it was said: "The very term church imports an organization for religious purposes; and property given to it eo

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nomine, in the absence of all declaration of trust or use, must by necessary implication be intended to be given to promote the purposes for which a church is instituted, the most prominent of which is the public worship of God.'

* * * It is a matter of common knowledge that the individuals who attend the services of any particular church are not limited to the members of that church, but are an indefinite and varying number of persons."

A gift to a church of land for a site for a church is a good charitable gift. *Schmidt v. Hess*, 60 Mo. 591; *Reformed Protestant Dutch Church v. Mott*, 7 Paige Ch. (N. Y.) 77; *Jones v. Habersham*, 107 U. S. 174; *Pennoyer v. Wadhams*, 20 Or. 274, 11 L. R. A. 210; *Van Wagenen v. Baldwin*, 7 N. J. Eq. 211.

Where a gift to an unincorporated company is definite and certain, a court of equity will enforce the execution of the trust. 2 Perry, Trusts (6th ed.) sec. 730. A gift of real and personal property generally, without stating the purpose, to a corporation existing for a peculiar purpose alone, must be regarded as a devise for such particular purpose. *Santa Clara Female Academy v. Sullivan*, 116 Ill. 375, 56 Am. Rep. 776; *McAlister v. Burgess*, *supra*; *First Universalist Society v. Fitch*, 8 Gray (Mass.) 421; *Gibson v. McCall*, 1 Rich. Law (S. Car.) 174.

We think it needless to multiply authorities. The gift to the church in question seems clearly to be a gift for charitable purposes. The will in the case at bar provides: "I give, grant, devise and bequeath to the First Congregational Church Society of Seward, Nebraska (the income from certain shares of bank stock), and I direct the officers of said bank to hold said principal amount of said bank stock in trust for the benefit of said church." It is contended, however, that the bank officers are not competent to take or administer the trust, and it is argued that the position of a bank officer and a trustee are incompatible. In other words, that there is such a conflict of interest that the officer cannot serve in his trust capacity without injury to the bank. On the other side, it

is argued that, if a bank officer may own stock as an individual, he may also hold it in trust for a beneficiary, and that his duty as such could not possibly conflict with his duty as a director, and the more zealously he performs his duties as a director the more faithfully he serves the interest of his beneficiary. Upon this point no authorities are cited; but, if it be conceded that the positions are incompatible, it does not follow that the trust must fail, for where the two offices are inconsistent the acceptance of the last vacates the first. In the instant case the officers have voluntarily accepted the trust, so, if it be incompatible, they have *ipso facto* vacated their positions as bank officers. We see nothing, however, which would indicate that the officers could not hold the stock in trust for the benefit of the church, and their duties as trustees are not in conflict with their duties as bank officers.

It is argued that the district court erred in holding that a trust was created in favor of the church with respect to the bank stock, and appellant's counsel ask: In whom does the title to the property now vest? Under the doctrine announced by the supreme court of Illinois in *Kemmerer v. Kemmerer*, 233 Ill. 327, 122 Am. St. Rep. 169, it vests in the executor or trustee.

In this case it is not necessary to resort to implication in order to vest this title in the trustees. By the terms of the will itself it is provided: "I direct the officers of said bank to hold said principal amount of said bank stock in trust for the benefit of said church." This language furnishes unmistakable proof that the testatrix intended to vest title to the bank stock in the officers of the bank and their successors in office, and was sufficient to vest the trustees with the legal title to said stock. *Young v. Young*, 80 N. Y. 422; *Organized Charities v. Mansfield*, 82 Conn. 504.

Great stress is placed by the appellant on that portion of the will providing that, if the gift to the church should fail, the property "reverts to her separate estate," and shall be divided among the heirs and legatees mentioned

in item 16. An analysis of this proposition shows it to be without merit. It was the primary wish of the testatrix to have the property go to the church. True, she annexed conditions, upon the occurrence of which the gift might fail, but they are conditions subsequent, and do not destroy the gift. None of those conditions have occurred. It follows that, if we give this property to the residuary legatee without the occurrence of those conditions, we violate the express language of the will of the testatrix.

We come now to consider the effect of item 10, which provides as follows: "I hereby give, grant, devise and bequeath to the First Congregational Church of Seward, Nebraska, the west seventy-five feet of lots numbered 7, 10 and 11, respectively, in block numbered 2 of the original town, now city, of Seward, Nebraska, to be used by said church society as a parsonage so long as said church shall remain the First Congregational Church or Church Society of Seward." The conditions attached to this gift are of the same nature as those relating to item No. 9, and are not vital to this discussion.

It is argued by the appellant that the interest of the church in the dwelling is at best a tenancy, or license, to cease upon certain conditions. It is apparent, however, from the language of the will that the testatrix intended to give the church some sort of an estate in the property. It is also apparent that that estate is what in law is considered a base or qualified fee. "A base or qualified fee is such an one as hath a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end." 1 Blackstone, Commentaries (Cooley, 4th ed.) 109. The estate is a fee because by possibility it may endure forever in a man and his heirs, yet as that duration depends upon concurrence of collateral circumstances which qualify and debase the purity of the donation, it is therefore a qualified or base fee. If the happening of the event upon which the estate is to be determined becomes impossible, it is converted into an estate in fee simple. 16 Cyc. 602.

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In *Mendenhall v. First New Church Society*, 177 Ind. 336, it was said: "It has been held that a conveyance of real estate to a religious society to hold so long as such real estate shall be devoted to the use and interest of the church, on the condition that said real estate should revert to the estate of the grantor on the cessation of such use, created in said religious society a determinable fee in the property." *North v. Graham*, 235 Ill. 178, 18 L. R. A. n. s. 624; *Lyford v. Laconia*, 75 N. H. 220.

In *Smith v. Smith*, 64 Neb. 563, and *Schnitter v. McManaman*, 85 Neb. 337, this court expressly recognized the validity of base or determinable estates. In the case last cited the will provided: "I give and bequeath to my beloved son, John N. Barrett, all property of which I shall die seized or possessed, whether real, personal or mixed." This of itself would have passed an estate in fee simple, but a later portion of the will provided: "In the event of the death of John N. Barrett without lawful issue born, the property herein bequeathed to him shall immediately become the property of my daughter Mary Katherine McManaman." Considering the will as a whole, it was decided that it was the intention of the testator to devise to his son a base or determinable fee.

The suggestion as to the title being in abeyance is without point, for here the fee is not in abeyance, but vested in the church, the proprietor of a determinable fee, so long as the estate in fee remains, until the contingency upon which the estate is limited occurs. Whatever estate was created by the will of Mrs. Douglass vested immediately upon her death. The limitations over, whatever be their legal effect as to creating future estates for the benefit of residuary legatees, cannot detract from the estate devised to the church.

We therefore hold that item 10 conveys to the church a determinable fee, defeasible by its terms upon the happening of certain events which may or may never occur. The estate conveyed to the church is an indefinite fee, and therefore the limitation over is not a remainder, but

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rather an executory devise, and vests no estate in the residuary beneficiary. *North v. Graham, supra; Lyford v. Laconia, supra; Mendenhall v. First New Church Society, supra.*

In concluding this opinion, it may be observed that the case has been ably presented by exhaustive and well written briefs; that many points are discussed therein which have not been adverted to by the court, but all questions raised by the briefs have had due consideration.

It may be said that it appears that Mr. and Mrs. Douglass came to Seward county, Nebraska, in 1870. They accumulated their fortune there, valued at about \$100,000. Of this amount Mrs. Douglass set apart for the religious use of the community in which they lived the parsonage and \$6,000 in bank stock. The residue was given to relatives residing in New York, New Jersey, Virginia, and California, who contributed nothing to the estate, nor the comfort of the testatrix in her lifetime. They have no moral claim to the generous bequest the will bestows upon them. The community in which Mr. and Mrs. Douglass spent their lives made this fortune possible, and it was a fitting manifestation of her gratitude towards the community that she made provision for the perpetuity of an institution devoted to its moral and religious worship. As we view the terms of her will, it needs no construction. It is as plain as words can make it.

The judgment of the district court was therefore right, and is

AFFIRMED.

REESE, C. J., LETTON and FAWCETT, JJ., not sitting.

HERMAN WACHTER ET AL., APPELLANTS, V. LOUIS LANGE
ET AL., APPELLEES.

FILED SEPTEMBER 26, 1913. No. 17,282.

1. **Drains: INJUNCTION: HIGHWAYS: ESTOPPEL.** Where a landowner knew of the placing of tile drains in a highway so as to drain a pond situated upon the lands of another, and actively assisted in the work of making drains or ditches upon his own land so as to conduct the water from the highway ditch over the same, an injunction will not be granted, years afterward, to enjoin the maintenance of the tile drains and ditches in the highway for the reason that in some years more water was discharged upon his land than he expected, or because the landowner above had promised to stop the flow of the water at intervals so as to allow him to farm the land below.
2. ———: **HIGHWAYS: REMEDIES.** Public authorities may construct drains along the side of highways if necessary to render the road passable. If in so doing they divert the waters of a pond out of the natural course of drainage and upon the lands of one not consenting to the work, they may not, ordinarily, if the work is done in good faith, be enjoined; but they may be liable for damages to persons whose lands or crops are injured. *Churchill v. Beethe*, 48 Neb. 87.

APPEAL from the district court for Clay county: **LESLIE G. HURD, JUDGE.** *Affirmed.*

H. C. Palmer and John C. Stevens, for appellants.

J. B. Scott and Ambrose C. Epperson, contra.

LETTON, J.

The plaintiffs, who are separate owners of distinct tracts of land lying in sections 23 and 26, town 7, range 5, complain that the defendants Lange and Cundall, who own, respectively, the northeast $\frac{1}{4}$ of section 23 and the northwest $\frac{1}{4}$ of section 24, in the same town and range, and the other defendants, who are members of the town board of Sutton township, have by means of certain tile drains and open ditches drained a lagoon of 60 to 80 acres in extent lying in the lands of Lange and Cundall, con-

trary to the usual and natural course of drainage, and in such a manner as to divert and throw upon the plaintiffs' land large quantities of surface water that otherwise would not reach the same, thereby causing the loss and destruction of crops and diminishing the value of their premises. They ask an injunction to prevent the maintenance of the drains and ditches. The district court denied the writ.

The making of the drains and ditches is admitted. The right of defendants so to discharge the waters is claimed to exist by way of consent and estoppel, and by virtue of the right of the township authorities to improve the public highway, leaving any one injured thereby to their remedy at law for damages.

It appears that the public road between sections 23 and 24 often became impassable on account of the height of waters in the large depression or lagoon through which the section line ran, and that in 1891, by agreement between one McDermott, who then owned the northeast quarter of section 23, and the road authorities and plaintiff Ebert, a six-inch tile drain was put in to drain the pond along the side of the highway to a slight depression in Ebert's land, whence it might flow to the southwest, eventually reaching a deeper depression on the lands of the other plaintiffs. Ebert testifies that while McDermott owned the land he suffered no damages, for that when he requested McDermott he would stop up the tile and prevent the water coming on his land until he had removed the crop standing thereon, but that Lange, who purchased from McDermott, refused to do this, giving as a reason that the tile was in the public road and he could not interfere; that prior to 1908 he suffered no damages, but that in that year his lands were flooded and his crop destroyed in the portion on which the water flowed. He admits that he and McDermott ran a grader to a depth of about 18 inches across his land and onto the land of plaintiff Wachter in order to facilitate the flow onto Wachter's land. Some of the other plaintiffs testify as to

the condition of the road prior to the time the tile was put in in 1901, and corroborate Ebert as to there being no trouble of any moment until 1908, on account of McDermott closing the tile until their farming work was done.

It is in evidence from their own testimony that plaintiffs Ebert, Buttell and Scheuerman were fully cognizant of the digging of the ditch and placing of the original tiling in 1901, and also of the substitution of the larger tiling in 1904, and made no objections thereto at the time. It is true they all testify that the reason they made no objection was on account of promises made by McDermott, and also for the reason that they were not aware that the placing of the larger tile would make the flow of water so much more rapid that it would injure the crops in the depression through their lands. Testimony on behalf of plaintiff also shows that in 1908 the town board closed the tile drain at the request of one of those farming the land below until he removed his crop, and that when he had finished his work the drain was again opened by the authorities. If a material matter in the case, it might be a matter of some doubt as to whether the depression on the land of Ebert where the water leaves the highway comes within the definition of a natural drainage channel, but, as we view the case, this is not a determining factor.

The conclusion we draw from the whole of the testimony is that the action is not barred by the statute of limitations, as defendants insist, but that the improvement of the highway made the lowering of the level of the water in the pond necessary, and hence the authorities were justified in digging the ditch and laying the tile. *Churchill v. Beethe*, 48 Neb. 87.

Moreover, the conduct of Ebert and others of the plaintiffs in making no complaint at the time, and in actively assisting in the work, places them in a position that a court of equity will not act in their behalf. *Gilmore v. Armstrong*, 48 Neb. 92.

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Plaintiff Wachter, however, seems to have been ignorant of the proceedings taken to collect and discharge the water upon his land. No authority has been shown in his tenant, who apparently gave consent, to do so. He may be in a position where he has a right of action for damages for the flooding of his land in 1908 and subsequently, if such has been the case. While a proprietor may have the right declared in *Todd v. York County*, 72 Neb. 207, and in *Aldritt v. Fleischauer*, 74 Neb. 66, to drain stagnant water into a natural drainage channel on his own lands, it has never been declared that he can, against the wishes of another landowner, enter upon his premises to open drains or ditches; or that he can collect and discharge surface water out of the natural course of drainage upon the lands of another.

We think, on the whole case, the district court properly denied the injunction, and its judgment is therefore

AFFIRMED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

**OTTO MUTZ, APPELLANT, V. CHARLES O. SANDERSON,
SHERIFF, APPELLEE.**

FILED SEPTEMBER 26, 1913. No. 17,305.

1. **Execution: LEVY: SALES IN BULK.** Under the provisions of the "Bulk Sales Law," a sale of a stock of goods in bulk without complying with the provisions of that measure is void as to creditors, and executions issued upon judgments obtained by creditors of the original vendor may be levied thereon the same as if no sale had ever taken place.
2. ———: ———: **CUMULATIVE REMEDIES.** The right to levy an execution upon a stock of goods purchased in bulk and out of the usual course of business, and without regard to the terms of ch. 62, laws 1907, commonly known as the "Bulk Sales Law," is cumulative to the remedies theretofore existing to creditors of

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the vendor, and it is not a condition of such right that an execution be first issued and be returned unsatisfied as to other property of the judgment debtor.

3. **Replevin: ORDER OF PROOF.** It is the duty of a plaintiff in replevin to produce the evidence of his title to the property in controversy in his case in chief, and it is within the discretion of the district court to refuse to permit such evidence to be introduced upon rebuttal.
4. **Witnesses: CROSS-EXAMINATION.** It is not erroneous to confine cross-examination to matters drawn out in the direct examination of a witness.

APPEAL from the district court for Clay county: **LESLIE G. HURD, JUDGE.** *Affirmed.*

Sterling F. Mutz, George W. Berge and R. J. Greene,
for appellant.

Charles H. Epperson, M. L. Corey, Paul E. Boslaugh
and *H. H. Wilson, contra.*

LETTON, J.

In October, 1909, plaintiff purchased a stock of goods from D. M. Roush, doing business in the name of the Spring Ranch Mercantile Company, without complying with the provisions of the "Bulk Sales Law." Laws 1907, ch. 62. Defendant, Sanderson, as sheriff of Clay county, levied four executions upon the stock while in Mutz's possession. These were issued upon judgments rendered against Roush in favor of certain wholesale houses who had supplied him with goods. This action was brought by Mutz to regain possession of the goods seized. The jury found for the defendant, judgment was rendered accordingly, and plaintiff appeals.

The first argument made by the appellant is that the word "void" in the bulk sales law means "voidable," and that, consequently, a creditor must first obtain a judgment against the judgment debtor, issue an execution against his property other than the stock of goods sold, and have it returned unsatisfied before he is entitled to levy upon

the property transferred. We think the latter proposition a *non sequitur*. The legislature evidently intended that a sale of a stock of goods in bulk made without compliance with the requirements of the statute, although it may be entirely valid as to all other persons, shall be void and of no effect as against creditors; that is, that the corpus of the goods shall remain as fully subject to execution and levy for the debts of the seller as if the sale had never taken place. It would seem that the title to goods sold from the stock by the vendee in the ordinary course of business will pass to the retail purchaser in identically the same manner as it would have done if the stock had remained in the possession of the vendor, but the stock itself in bulk occupies the same relation to the creditors as if no sale had ever taken place; but this it is unnecessary to decide. *Appel Mercantile Co. v. Barker*, 92 Neb. 669. We think it unnecessary to cite or discuss the cases referred to in the briefs, since the language of the statute is clear that the sale is void as to creditors, unless its terms are complied with.

These considerations practically dispose of the argument that garnishment is the only proper remedy. The statute does not in any manner abrogate the rights and remedies which creditors had prior to its passage, and the remedy given by it is cumulative to those already existing.

It is also assigned that the verdict is contrary to the evidence, and contrary to the law, because the jury should have found that Mrs. Roush was a partner in the business, and that, hence, creditors of D. M. Roush had no right to levy upon partnership property for his individual debt. The evidence conflicts as to whether Mrs. Roush had an interest in the stock and business. No instruction was requested by plaintiff asking that this question be submitted to the jury. The jury evidently believed that Roush was the owner, and we think this finding is in accordance with the great preponderance of the evidence.

In this connection complaint is made of instructions Nos. 4 and 5 as being inconsistent. A clause in No. 4

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states: "There is no contention but that the plaintiff, Mutz, bought these goods of Roush." This instruction as a whole tells the jury that the executions are issued upon judgments obtained by creditors of Roush and against him, and that the sheriff has levied the same upon a stock of goods in the possession of Mutz, claiming the right to do so by virtue of the "Bulk Sales Law." The court then recites to the jury the provisions of that statute requiring a buyer of a stock of goods sold in bulk to procure the names of creditors, and to notify them, in order that the sale be valid as to such creditors. The clause complained of follows. In the fifth instruction it is said: "It is contended by the plaintiff that he bought the goods from the Spring Ranch Mercantile Company, and not from Roush, the person against whom these executions run. As to this, it is immaterial under what name Roush conducted the business if, in fact, he was the owner of it and of the stock of goods sold to plaintiff, Mutz." We think the instructions are not inconsistent when each is considered as a whole. Moreover, the point sought to be made in this court as to the existence and effect of a partnership interest in the stock being held by Mrs. Roush was not definitely raised in the lower court. The charge as a whole seems adequately to set forth the issues and the theory upon which the case was tried, and we find no prejudicial error therein.

It is next contended that evidence to show that a part of the goods levied upon had been purchased by Mutz since the sale was erroneously excluded. Mr. Mutz testified in chief that he was the owner of the stock of goods and had bought it from the Spring Ranch Mercantile Company. He was asked upon rebuttal to examine the return upon the execution and state whether he could tell "the different articles of merchandise contained in the inventory which were acquired by you after you purchased the merchandise of the Spring Ranch Mercantile Company." This was objected to as incompetent, irrelevant and immaterial, and not proper rebuttal evidence,

and the objection was sustained. The plaintiff then offered to show by this witness that goods to the value of \$1,009.13 of those levied upon under the four executions were put in stock between October 30, 1909, and May 25, 1910. A like objection was sustained to this offer. It is said by appellant that if this evidence had been admitted plaintiff would have shown that these goods were new lines which had not been carried by the Spring Ranch Mercantile Company, and had not been confused and commingled with the general stock. It is, no doubt, true that goods purchased after the sale, which have been kept separate and not commingled with the general stock, may not be levied upon as the property of the vendor, but no such conditions were made apparent at the trial. Moreover, the evidence offered was not proper in rebuttal. Plaintiff was asserting title to the property taken. He should have produced his evidence of title to these specific chattels upon his case in chief. We find no error in this ruling.

It is next complained that the court erred in sustaining the objection to a question put to Mr. Roush on cross-examination as to whether he had made arrangements after the sale with any creditors in regard to the settlement of accounts. It was objected that this was not proper cross-examination and the objection was sustained. It is said in this connection that in the motion for a new trial it is shown that one of the creditors was paid in full, and that the judgment was collusively obtained, and also that it is proper cross-examination because in direct examination Roush claimed that he had not paid any of the claims in controversy. We think the objection was properly sustained. We find that Mr. Roush upon his direct examination was inquired of whether he had paid certain particular creditors, naming them, and that he stated he had not paid such claims, but we find no general denial such as is stated. Furthermore, the evidence set forth in the motion for a new trial would not justify the granting of the same for the reasons urged; being too vague, indefinite, and remote to warrant the relief asked for.

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Complaint is also made with respect to certain language used in instruction No. 5. While, perhaps, the language of the instruction might have been less involved, and its meaning clearer and more apparent, we do not find that the issues were in anywise confused thereby.

The contention made that the bulk sales law is unconstitutional and void has already been considered and disposed of in *Appel Mercantile Co. v. Barker, supra*. It is probably true that the plaintiff has suffered hardship by his failure to comply with the provisions of the statute. Under the law as it stood before the passage of the act, creditors were often made the victims of misplaced confidence and defrauded of their just dues by sales of merchandise in bulk and the removal or concealment of the proceeds. The legislature sought to remedy this evil by a short and simple statute, which, if followed, would protect both buyer and creditor. If the law is unwise or oppressive, the lawmakers must be appealed to for relief.

We find no prejudicial error in the record, and the judgment of the district court is

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

SMITH BROTHERS, APPELLEE, v. CAROLYN D. WOODWARD,
APPELLANT.

FILED SEPTEMBER 26, 1913. No. 17,312.

1. **Appeal: ADMISSION OF EVIDENCE: HARMLESS ERROR.** The admission of incompetent evidence in an equity case is error without prejudice if the competent evidence sustains the findings and judgment.
2. **Evidence: RECORDS: CERTIFICATE.** A certificate of the filing of an instrument for record under provisions of sections 9603, 9608,

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Ann. St. 1911, signed in proper form by one purporting to be the register of deeds, or his deputy, is sufficient proof, *prima facie*, that the document was so filed.

APPEAL from the district court for Polk county: GEORGE F. CORCORAN, JUDGE. *Affirmed.*

Matt Miller, for appellant.

Mills & Beebe, *contra*.

LETTON, J.

This is an action to foreclose a lien on certain property of the defendant and appellant for the price of certain building material furnished by the plaintiffs and used in making additions, alterations and repairs to the dwelling thereon in which defendant lived. There is no dispute in the evidence as to the quantity or price of the materials furnished. The defense is that the material was not purchased by the defendant or furnished to her. It appears that Doctor Woodward, defendant's husband, first arranged with the plaintiffs to supply the lumber; but the testimony on behalf of plaintiff is to the effect that Mrs. Woodward afterwards called their office by telephone and ordered part of the material. It was all delivered at the dwelling where she lived. Defendant denied that such a conversation ever took place; but the trial court, with the witnesses before it, evidently found for the plaintiffs on this point. We are unable to say that the testimony, especially when considered with the circumstances that the defendant was present at the time the work was being done, and to some extent at least suggested the manner of performance of a portion of it, does not support the finding. Dr. Woodward also testified to the fact of defendant's ratification and assent to the agreement made by him for the material. Though this testimony is somewhat weakened by the fact that a subsequent estrangement occurred between him and Mrs. Woodward, it tends to support the general finding for the plaintiffs.

Hartington Nat. Bank v. Giles.

Complaint is made that errors were made in receiving certain incompetent evidence. The case being tried without a jury, this could not be prejudicial if sufficient competent testimony appears in the record to support the finding.

It is also urged that there is a failure of proof that the claim of lien was ever filed as the statute requires. The certificate seems to be in exact accordance with the provisions of sections 9603, 9608, Ann. St. 1911, and is sufficient *prima facie*. It was unnecessary to prove aliunde that the person purporting to have signed it as county clerk was at that time the incumbent of the office, and so likewise as to the holder of the office of deputy county clerk. The signed certificate was *prima facie* sufficient.

We think the conclusion reached by the district court is supported by the evidence, and it is therefore

AFFIRMED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

HARTINGTON NATIONAL BANK, APPELLEE, v. L. L. GILES,
APPELLANT.

FILED SEPTEMBER 26, 1913. No. 17,327.

1. **Appeal: EXCLUSION OF EVIDENCE: HARMLESS ERROR.** The exclusion of competent evidence at one stage of a trial is not prejudicially erroneous if the facts sought to be proved are subsequently established.
2. **Bills and Notes: ACTION: DEFENSE OF NO CONSIDERATION.** Under the facts stated in the opinion, *held* that the defense of no consideration was not established.

APPEAL from the district court for Cedar county: GUY
T. GRAVES, JUDGE. *Affirmed.*

H. E. Burkett, for appellant.

P. F. O'Gara, contra.

LETTON, J.

Action on promissory note brought by the indorsee. The defense is that the note was given without consideration, and that the plaintiff is not a *bona fide* holder for value, but knew at the time it was purchased that there was no consideration given for its execution. It is also alleged that plaintiff bank is not the real party in interest. The note, which is for \$32.10, is dated August 9, 1909. The cashier of the plaintiff bank testified that he purchased the note of one Turley on August 12, 1909, at a price that would net the bank 10 per cent. interest. It appears that the note was executed payable to one Turley, who was an agent for the Security Mutual Life Insurance Company, in payment for life insurance; that at the time it was made and delivered Mr. Kimball, the cashier of the plaintiff bank, was present and introduced Turley to Giles; that what is termed by insurance men a "binding receipt" for the note was given Giles, which stated that he was required to take and pass a medical examination before the policy would issue; and that Giles refused and neglected to present himself for such examination. Kimball had an agreement with Turley that he was to receive 20 per cent. of the proceeds for his introduction and assistance in procuring the insurance contract. The note was bought three days after its execution.

Defendant complains that the court excluded testimony offered by him to prove certain of the facts before related. Since the facts all came out eventually, no prejudicial error occurred by this exclusion.

We are of opinion that the defense of no consideration was not established. The note was given in consideration of a contract of insurance, conditioned, it is true, but none the less a contract, and no breach or failure had occurred at the time of the purchase. If there was a breach of the contract, it was made by Giles when he

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refused to take the medical examination. The facts do not bring the case within the doctrine of the North Dakota case relied upon by defendant. *Bank v. Garceau*, 22 N. Dak. 576. In that case the defendant performed his duty under the contract, duly offered himself for examination, and was rejected by the medical examiner, while in this case the default was wilfully made by the defendant.

The district court properly held no defense had been established, and its judgment is

AFFIRMED.

ROSE, FAWCETT and HAMER, JJ., not sitting.

WILLIAM R. CUNNINGHAM ET AL., APPELLANTS, v. MALVINA MARIE MARSHALL, APPELLEE.

FILED SEPTEMBER 26, 1913. No. 16,969.

Homestead: SUIT TO ESTABLISH: EVIDENCE. In a contested suit to establish homestead rights, failure to prove the acquisition or occupancy of a homestead defeats plaintiff's case.

APPEAL from the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Affirmed.*

Morning & Ledwith, for appellants.

S. L. Geisthardt, contra.

ROSE, J.

This is a suit in equity to establish homestead rights in 240 acres of land in Lancaster county. The trial court dismissed the case after a full hearing, and plaintiffs have appealed.

Felix Cunningham, a married man, held the legal title

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to the land, and, describing himself as a single man, deeded it to Frank McKelvie, May 5, 1897. For full value the latter deeded the land to Joseph H. Marshall, who willed it to defendant, his wife. He died June 15, 1907. Felix Cunningham is dead. Four of his five children are plaintiffs. His wife was divorced, and is not a party to this action. During the time covered by the asserted acquisition and occupancy of the homestead pleaded, the wife and all of the children, except the oldest son, lived in New York, and never saw the premises in controversy. A fair interpretation of all of the evidence leads inevitably to the conclusion that neither the father nor his oldest son ever acquired, occupied or claimed, when in possession, a homestead in the land, within the meaning of the homestead law. An analysis of the evidence upon which this conclusion rests would neither benefit the parties nor make an addition to the law, and will not be attempted. For failure to establish this material fact, the case of plaintiffs entirely fails. The decree conforms not only to the law, but to the demands of equity.

AFFIRMED.

REESE, C. J., LETTON and FAWCETT, JJ., not sitting.

MCCAULL-DINSMORE COMPANY, APPELLEE, v. HANS P. NIELSON, APPELLANT.

FILED SEPTEMBER 26, 1913. No. 17,228.

Appeal: FINDINGS: CONFLICTING EVIDENCE. A finding of the trial court, if sustained by sufficient evidence, in an action at law tried without a jury, will not be set aside on appeal, where the controverted issue was determined on substantially conflicting evidence.

APPEAL from the district court for Adams county: HARRY S. DUNGAN, JUDGE. Affirmed.

John M. Ragan, for appellant.

Tibbets, Morey & Fuller, contra.

ROSE, J.

Plaintiff's claim consists of three items: Damages resulting from defendant's failure to deliver at Minneapolis 2,500 bushels of wheat at 76½ cents a bushel under a sale contract dated March 9, 1907, "thirty days' shipment," the time having been subsequently extended so that the bill of lading would reach plaintiff at Minneapolis before November 1, 1907, \$331.20; overpayment for a former shipment, \$20.44; protest fees for nonpayment of draft \$2.50—total \$354.14. The first item only is controverted.

According to the petition defendant sold plaintiff 2,500 bushels of wheat at 76½ cents a bushel, and was short in delivery to the extent of 1,522 bushels and 50 pounds, which plaintiff was compelled to purchase from another at the increased market price of 98 cents a bushel, thereby sustaining a loss of 21½ cents a bushel; the difference between the contract price and the market price amounting to \$331.20. Defendant, in addition to a general denial, answered that the extension agreement permitted him to ship the remainder of the wheat from Lexington, Nebraska, by November 1, 1907, and that he had the wheat on hand there and was engaged in loading it October 31, 1907, when he received from plaintiff a telegram stating that it had canceled the contract and bought wheat to cover the remainder. The parties waived a jury and tried the case to the court. The findings and the judgment were in favor of plaintiff, and defendant has appealed.

The terms of the extension agreement were the controlling issues in the case. Was the bill of lading to reach plaintiff at Minneapolis before it purchased wheat to cover defendant's shortage in delivery? The findings are in favor of plaintiff, but defendant argues they are not sustained by sufficient evidence. Though two abstracts have been filed, the bill of exceptions has been examined

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to determine the merits of the controversy. There is evidence sufficient to sustain the agreement as pleaded by plaintiff. As thus proved, defendant did not comply with its terms. The damages are established. The evidence is conflicting, and the case falls within the rule which makes the findings of the trial court conclusive.

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

CHARLES W. WHITNEY, APPELLEE, v. CARL BROEDER ET AL.,
APPELLANTS.

FILED SEPTEMBER 26, 1913. No. 17,273.

1. **Appeal: REJECTION OF EVIDENCE: BRIEFS.** An assignment of error directed to the rejection of offered testimony may be disregarded on appeal, if the places in the record where the offer of proof and the challenged ruling may be found are not pointed out in appellant's brief.
2. **Trial: INSTRUCTIONS: RECORD.** An instruction requiring the party on whom the burden of proof rests to "satisfy" the jury on an issue of fact by a preponderance of the evidence is not a ground for reversing a judgment, where prejudice to appellant is not shown by the record.
3. ———: ———: ———. The giving of instructions submitting to the jury as an issue of fact the authority of an agent to make warranties in selling horses for his principal, *held* not ground for reversing a judgment in favor of the latter, on a record showing that the parties raised such issue by the pleadings and supported it by proof, and that the trial court was not asked to determine that issue as one of law, or to take that question from the jury by an instruction.

APPEAL from the district court for Lincoln county:
HANSON M. GRIMES, JUDGE. *Affirmed.*

Wilcox & Halligan, for appellants.

Hoagland & Hoagland, contra.

ROSE, J.

Plaintiff sued defendants for the balance due on a promissory note for \$900, dated July 9, 1907, payable January 9, 1908, and bearing interest at the rate of 10 per cent. per annum. A credit of \$639.50, August 19, 1907, is pleaded in the petition, leaving unpaid a balance of \$260.50. Defendants admitted the execution and delivery of the note and the payment of \$639.50. In addition, the following facts are pleaded in the answer: The note was given for 26 horses and 9 colts purchased by defendants from plaintiff. Six of the horses had recently been castrated, and plaintiff, through C. A. Moore, who was the former's agent, agreed that, if any of the animals should die as the result of castration, their value should be credited on the note. A few days after the sale two animals of the value of \$75 so died, and plaintiff is entitled to credit for that sum. As an inducement to the purchase, plaintiff, through the agent Moore, falsely represented to defendants and warranted that none of the animals was over eight years old. In these respects defendants relied on plaintiff. Fifteen of the animals were from 12 to 15 years old, and were worth \$25 a head less than they would have been had they been as represented. By reason of plaintiff's false representations and breach of warranty, defendants were damaged in the sum of \$375. All of the facts pleaded by defendants, except the admissions in the answer, are denied in a reply. The case was tried to a jury. From a judgment in favor of plaintiff for \$291.19, defendants have appealed.

The first assignment of error is directed to the rejection of offered testimony, but the places in the abstract or bill of exceptions where the offer of proof and the challenged ruling of the trial court may be found are not pointed out in the brief. The assignment will therefore be disregarded for failure to comply with that part of rule 9 which de-

clares: "Each brief shall by number designate the several pages of the record containing matter bearing upon the questions discussed in such brief."

The following instruction is criticised as erroneous: "If the defendants have failed to satisfy you by a preponderance of the evidence that C. A. Moore acted as plaintiff's agent in the sale of the horses in question, or that he acted within his authority or apparent authority, or that he agreed to credit the value of all horses that died as the result of their castration upon the note sued upon, and guaranteed and warranted all of said horses to be eight years old and under, then you will return a verdict for plaintiff; or, if defendants have failed to satisfy you by a preponderance of the evidence that defendants believed and relied upon said Moore's alleged agreement to give credit on the note sued upon for the value of all horses that died as the result of their castration, and the alleged guarantee and warranty that said horses were of the age of eight years and under, or that such representations were what induced defendants to buy, you will find for plaintiff."

It is argued that the word "satisfy" in the connection in which it is thus used, requires too high a degree of proof. It is contended that to "satisfy" a jury on an issue of fact is to require more than a preponderance of the evidence. Instructions containing expressions like those quoted have frequently been criticised, but they are not necessarily prejudicial. In the present case the word "satisfy" is modified "by preponderance of the evidence." It is only by a preponderance of the evidence that the jury are to be satisfied. Earlier in the charge they were directed that defendants admitted the execution and delivery of the note, and that the burden rested upon them to show by a preponderance of the testimony each and every material allegation of their answer. "If the preponderance is with the plaintiff," said the trial court, "or if the testimony is evenly balanced, you should find for the plaintiff." In that part of the instructions defendants were not re-

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quired to "satisfy" the jury by a preponderance of the evidence. When the charge is considered as a whole, in connection with the entire record, there is nothing to indicate that the jury were misled, or that defendants were prejudiced by the use of the word "satisfy" in the instructions. Qualifications of the term "preponderance of the evidence" were criticised in *Altschuler v. Coburn*, 38 Neb. 881, but an instruction open to such criticism did not result in a reversal. For the same reasons, this assignment of error will be overruled.

The final assignments of error are directed to a number of instructions submitting to the jury the issue as to Moore's authority to make representations and warranties. It is argued that the trial court should have decided, as a matter of law, that Moore had authority to act for plaintiff in making the sale. In the answer it was alleged that Moore was the agent of plaintiff, and acted for him in making the representations and warranties. This was denied by the reply. Defendants were conceded the right to open and close, and adduced proof tending to establish the representations and warranties upon which they relied, and Moore's authority to make them. Plaintiff testified that Moore had no such authority. The parties therefore tried the issue as one of fact, and the trial court adopted their theory. The abstract does not show that defendants, at any stage of the proceedings, asked the trial court to determine Moore's authority as a question of law, or that an instruction to that effect was requested. With the record in the condition indicated, defendants are not entitled to a reversal on the ground that the issue as to the authority of plaintiff's agent was erroneously submitted to the jury. No reversible error has been pointed out, and the judgment is

AFFIRMED.

BARNES, FAWCETT, and HAMER, JJ., not sitting.

MEYER BROTHERS DRUG COMPANY, APPELLEE, v. HIRSCHLING-MORSE COMPANY, APPELLANT.

FILED SEPTEMBER 26, 1913. No. 17,290.

1. **Pleading: STRIKING PART OF ANSWER.** In a suit on a note, it is not prejudicial error to strike from the files all of the answer, except an admission of the execution, delivery and nonpayment of the note, where no defense or proper counterclaim or set-off is pleaded.
2. ———: **JUDGMENT ON PLEADINGS.** In a suit on a note, a motion in favor of plaintiff for judgment on the pleadings may be sustained, where the execution, delivery and nonpayment of the note are admitted in an answer pleading no defense or proper counterclaim or set-off.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed.*

John S. Bishop, R. S. Mockett and A. S. Tibbets, for appellant.

S. L. Geisthardt, contra.

ROSE, J.

The action was commenced before a justice of the peace to recover the amount due on a promissory note for \$43.86, dated March 31, 1908, payable May 15, 1908, and bearing interest at the rate of 7 per cent. per annum. From a judgment in favor of plaintiff, defendant appealed to the district court. There plaintiff recovered a judgment on the pleadings for \$31.30; being the amount of plaintiff's claim, less a former judgment in favor of plaintiff and against defendant for \$22.50. Defendant has appealed.

There are three assignments: The trial court erred (1) in striking from the files the amended answer and cross-petition; (2) in sustaining the motion of plaintiff for judgment on the pleadings; (3) in rendering judgment against defendant without a trial, and while defendant had an answer and cross-petition on file.

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1. The amended answer condemned by the trial court admitted all of the allegations of the petition, and under a ruling below this admission was permitted to remain in the pleadings. In allowing a credit for the amount of a former judgment, the trial court ruled in favor of defendant, who, in that respect, has no ground of complaint. A counterclaim for a tort, which was made the basis of a demand for \$5,000, was properly stricken out as not being within the jurisdiction of the justice of the peace or litigable upon appeal. The record does not affirmatively show error in the holding that the answer as a whole contained no matter amounting to a defense or to a proper counterclaim or set-off.

2. The execution, delivery and nonpayment of the note being admitted in an answer containing no proper defense, there was no error in sustaining the motion for judgment on the pleadings.

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

STATE OF NEBRASKA V. JOHN F. THORP.

FILED SEPTEMBER 26, 1913. No. 18,014.

Information: INTENT: PURE FOOD LAW. An information charging defendant in the language of the statute with wilfully and unlawfully violating the pure food law by overreading a test of cream purchased by him for commercial purposes is not demurrable for failing to charge that the act was committed with the intent to defraud the seller; such intent not having been made by statute an element of the offense. Comp. St. 1911, ch. 33, sec. 20.

ERROR to the district court for Cuning county: GUY T. GRAVES, JUDGE. *Exception sustained.*

Grant G. Martin, Attorney General, and Frank E. Edgerton, for plaintiff in error.

A. R. Oleson, contra.

ROSE, J.

In the district court for Cuming county defendant was accused of violating the pure food law by overreading a test of cream purchased by him from William Pfeuger. The trial court sustained a demurrer to the information and dismissed the prosecution. For the purpose of settling the law, an exception to the ruling on the demurrer is presented here under section 515 of the criminal code.

That part of the pure food law which defendant is accused of violating makes it unlawful for any person to "overread or underread, or in any other manner make, announce or record any false or untrue test of either butter or cream." Comp. St. 1911, ch. 33, sec. 20. The charge is that John F. Thorp in Cuming county, November 26, 1912, "did then and there wilfully and unlawfully overread a certain test of cream, and did then and there wilfully and unlawfully make and announce a false and untrue test of cream, he the said John F. Thorp being then and there engaged in the business of testing and purchasing cream for commercial purposes, and having then and there purchased the said cream for commercial purposes from one William Pfeuger." The information was attacked by demurrer (1) "because the facts stated therein do not constitute an offense punishable by the laws of this state; (2) because the intent is not alleged, proof of such intent being necessary to make out the offense charged; (3) because there is no allegation of any intent to defraud any one in the doing of the acts complained of."

Counsel appointed by the trial court to present the reasons for the sustaining of the demurrer argues that the statute can only be sustained by construing it to mean that an intent to defraud the seller by an underreading and that an intent to defraud the purchaser by an overreading are essential elements of the offense. It is further insisted that the result of overreading the test was to pay too much for the cream, and that defendant did not cheat or intend to defraud any one. The legislature, however, did not use language making intent an ingredient of

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the offense condemned, nor is the statute void for that reason. The act was passed in the exercise of legislative power to protect the public health and to regulate weights and measures. The protection of health and the testing, weighing and measuring of food products are so closely connected with the public welfare that no limitation not imposed by the constitution upon legislative power in relation thereto should be fixed by the courts. These are among the common and necessary subjects of both state and municipal legislation. Within constitutional limitations the legislature is the judge as to how the demands of society in these respects are best subserved. Reasonable laws which make the authority of food commissioners and boards of health effective for the protection of the public are proper enactments and must be respected by those who buy and sell and measure and weigh perishable foods. The intent with which reasonable statutory regulations are disobeyed by persons engaged in buying or in selling cream, and who are thus dealing with the public in a necessary article of food, is not always essential to a criminal charge or to proof of guilt. An evil intent or malice may be presumed from the wilful violation of a positive statute. Where the statute does not make intent a part of the violation of a proper police regulation, it is not always necessary to charge or prove it. *State v. Hurds*, 19 Neb. 316; *Seele v. State*, 85 Neb. 109; *Staley v. State*, 89 Neb. 701; *Harding v. People*, 10 Colo. 387; *Commonwealth v. Graustein*, 209 Mass. 38; *Commonwealth v. Mixer*, 207 Mass. 141; *State v. McBrayer*, 98 N. Car. 619; *State v. Smith*, 17 R. I. 371; *Mills v. State*, 58 Fla. 74; *State v. Henzell*, 17 Idaho, 725, 27 L. R. A. n. s. 159. Both the statute and the information are within the recognized exception to the general principle that intent is an element of a criminal offense and a necessary part of an information. The exception of the county attorney to the sustaining of the demurrer is therefore well taken.

EXCEPTION SUSTAINED.

REESE, C. J., LETTON and FAWCETT, J.J., not sitting.

NELS O. ALBERTS, APPELLEE, V. COURTLAND WAGON COMPANY, APPELLANT.

FILED SEPTEMBER 26, 1913. No. 16,907.

1. Judgment: REVIVOR: PLEA OF PAYMENT. "In a proceeding to revive a dormant judgment, where the judgment debtor pleads payment, a presumption of payment arises, and the burden is upon the judgment creditor to rebut that inference." *Platte County Bank v. Clark*, 81 Neb. 255.
2. Quieting Title: EQUITY: DORMANT JUDGMENT: PRESUMPTION OF PAYMENT. And the rule is the same where the judgment creditor is demanding the payment of a dormant judgment as a condition precedent to the right of the judgment debtor to quiet his title to real estate as against such dormant judgment.

APPEAL from the district court for Clay county: LESLIE G. HURD, JUDGE. *Reversed with directions.*

Ambrose C. Epperson and Robert G. Brown, for appellant.

John C. Stevens, contra.

FAWCETT, J.

Plaintiff instituted this suit in the district court for Clay county to quiet his title to certain lots and lands in that county. The petition alleges that on November 9, 1885, plaintiff was engaged in business with one Oberlander; that on said date the defendant obtained a judgment against plaintiff and Oberlander, as partners, in the sum of \$87.13, and another judgment for the sum of \$170.56; that on November 11, 1885, defendant caused such judgments to be transcribed to the district court, and thereby caused them to create an apparent lien upon plaintiff's property; that said judgments have long since been paid, but through negligence, carelessness, or oversight the evidence of their payment had not been filed with the clerk of the district court; that they are nonenforceable by lapse of time; that they so affect plaintiff's real

estate that those who deal with it are fearful that such judgments might be valid. Wherefore, he prays that the judgments be canceled of record and the title to his real estate quieted. The answer denies that the judgments were obtained against plaintiff and Oberlander as partners; denies that they have been paid; alleges that plaintiff has failed to tender the amount which in equity is due upon the judgments, and is not entitled to the relief he seeks, "except that he first pays the amount which is, in equity, due upon the said judgment liens;" alleges the amount due upon the judgments as an equitable lien upon the real estate, and prays that defendant have a sale of the property described in plaintiff's petition for the payment and satisfaction of the judgments. The trial resulted in a finding that plaintiff's petition is without equity; that he is not entitled to the relief prayed without first paying the judgments described in the pleadings; that said judgments have never been paid in whole or in part; that the judgments have been dormant for more than ten years prior to the institution of this suit; and that defendant is not entitled to affirmative relief. Plaintiff's petition and defendant's cross-petition were both dismissed at plaintiff's cost. From this judgment defendant appeals, and plaintiff joins with a cross-appeal.

The briefs are devoted quite largely to the proposition that plaintiff could not prosecute his suit to quiet title without doing equity by paying the judgments. We deem it unnecessary to consider this phase of the case, for the reason that we do not think there is any competent evidence in the record to overcome the presumption in support of the allegation in plaintiff's petition that the judgments have been paid. This suit was instituted February 16, 1910. The judgments were rendered November 9, 1885, over 24 years prior to the beginning of the suit. During all of those years no attempt was made to collect the judgments, not even to the extent of having execution issued thereon. The only proof attempted to be offered in support of defendant's plea that the judgments had not

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been paid was the testimony of one of defendant's attorneys. The substance of his testimony is as follows: "Q. What is your profession? A. I have been an attorney at law. Q. And where did you reside in 1885? A. At Sutton. Q. What was your business or profession then? A. An attorney at law." These questions and answers would indicate that he is not now in active practice. The substance of the rest of his testimony is that he procured the judgments in controversy; that the judgments have never been paid to him; that after the suit was commenced and shortly before the trial he had a conversation with plaintiff, in which the plaintiff admitted that he (plaintiff) had never paid the judgments, but that plaintiff claimed, in that conversation, that Oberlander had paid the judgments, or fixed the matter up. When interrogated upon cross-examination as to the whereabouts of the defendant company, he shows a lack of knowledge of the present business status of defendant. When asked if the defendant company is still in existence, his answer was, "Oh, yes; I think so." He further stated that he was not sure but what they changed to the Courtland Buggy & Wagon Company. When asked if the old corporation had "all gone to pieces," he answered, "I ain't prepared to say that it has, but they still do business at New York as the Courtland Buggy Company or the Courtland Buggy & Wagon Company." When asked, "When did they authorize you to appear here for them?" his co-counsel objected, and the objection was sustained. When asked, "When did you last hear from the Courtland Wagon Company?" objection was again interposed and sustained. When further asked, "Q. The only reason you have for saying that this judgment is not paid is because you didn't get the money, is it?" he answered, "Well, I was doing the business for the company and I am confident it was not paid to me." And when finally asked, "As a matter of fact you wouldn't swear that it hasn't been paid, will you?" he answered, "Well, I don't know that I could. I have testified all I can testify and tell the truth."

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As we view it, this evidence falls far short of rebutting the presumption of payment. So far as this record discloses, these are the only judgments which Mr. Brown ever obtained for the defendant company. They were obtained nearly a quarter of a century ago. He does not show that he has ever had any connection with or communication from the company since that time, and the fact that the judgments have never been paid to him falls far short of showing that they have not been paid to the defendant. If they have not been paid to the defendant, it would have been an easy matter to have shown that fact by the deposition of some member of the company, but no attempt was made to produce such testimony. It may be said in answer to this that it would have been an easy matter for plaintiff to have testified that the judgments had been paid, but the record shows that plaintiff was not present at the trial; and, when Mr. Brown testified that plaintiff had admitted to him that he (plaintiff) had never paid the judgments, counsel for plaintiff then stated: "The plaintiff is taken by surprise by the testimony of the witness on the stand and asks that the case be adjourned until we have time to get the testimony of the plaintiff. Objection overruled. Plaintiff excepts." The admission by plaintiff to Mr. Brown, in the conversation to which the latter testifies, that he (plaintiff) had not paid the judgments, was coupled with the statement to Mr. Brown that Mr. Oberlander had paid them, or "fixed it up." Where judgments have stood for so long a time without any attempt to collect them, it requires more positive testimony than anything appearing in this record to overcome the presumption of payment. The third subdivision of the opinion by Judge Root in *Platte County Bank v. Clark*, 81 Neb. 255, fully sustains the conclusion above reached. We think the testimony of payment in that case was stronger than in this.

Considering the indifference and gross laches of defendant in asserting the validity of these judgments, and the fact that defendant could easily have established its claim

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upon the hearing of this case, if it has any valid claim, and considering the many years that plaintiff has been handicapped by this apparent lien upon his property, we think plaintiff is now entitled to full relief. The judgment of the district court is therefore reversed and the cause remanded, with directions to enter a decree in favor of plaintiff in accordance with the prayer of his petition.

REVERSED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

LIZZIE L. WRIGHT ET AL., APPELLEES, V. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, APPELLANT.

FILED SEPTEMBER 26, 1913. No. 17,189.

1. **Master and Servant: INJURY TO SERVANT: RULES: SUFFICIENCY: QUESTION FOR JURY.** A railroad company has a right, and it is its duty, to make reasonable rules for the protection of the safety of its employees, and such rules its employees are bound to regard and obey; but whether or not any particular rule, under the circumstances shown, is sufficient and adequate for the safety of the company's employees, is a question of fact for the jury.
2. ———: ———: **NEGLIGENCE.** Under the rules of the defendant company, the switch engine in its Lincoln yards had the right to occupy the main track, protecting itself against overdue trains. The extra, which was being run by plaintiff's decedent, was required to proceed through the yard under full control, and protect itself within yard limits. The switch engine having the right of way over the extra, it was the duty of the decedent to be on the lookout for the switch engine and to take such precautions as the situation demanded to prevent a collision; but this did not relieve the crew of the switch engine from the exercise of ordinary care in avoiding a collision with the extra, which they knew had entered the yard.
3. ———: ———: ———: **QUESTION FOR JURY.** The uncontradicted evidence shows that the defendant company, at and prior to the collision which caused the death of plaintiff's decedent, had not promulgated any written or printed rules regulating the rate of speed at which the switch engine might be run in its yards.

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Held, That it was for the jury to say whether or not, under the circumstances shown, the failure of the company to adopt and promulgate such a rule was negligence on its part.

4. **Negligence:** EVIDENCE. There being no evidence in the record tending to show negligence on the part of plaintiff's decedent, the question of contributory negligence does not arise.
5. **Damages.** The evidence shows that the decedent was a man of good health, 32 years of age; that he was earning from \$125 to \$150 a month; that his expectancy, according to the Carlisle table, would be 32 years. *Held*, That we cannot say that \$15,000 is an excessive judgment under these circumstances.
6. **Commerce:** INTERSTATE. Plaintiff's decedent was running a lone engine, as an extra, from one point to another in this state, not in connection with any cars. *Held*, That he was not engaged in interstate commerce.
7. **Instructions** complained of and set out in the opinion, examined, and *held* free from prejudicial error.
8. **The evidence** examined and set out in the opinion, *held* sufficient to sustain the verdict and judgment.

APPRAI. from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Affirmed*.

M. A. Low, P. E. Walker, E. P. Holmes and G. L. De Lacy, for appellant.

George W. Berge, contra.

FAWCETT, J.

From a judgment for \$15,000 in favor of the plaintiffs on account of the alleged negligence of the defendant in causing the death of Otto O. Wright, husband of plaintiff Lizzie L. Wright, defendant appeals.

The abstract contains 86 printed pages, the supplemental abstract 201 pages, the brief and reply brief of appellant 139 pages, and the brief of appellee 90 pages. To follow counsel through this voluminous record and through their equally voluminous briefs would necessitate an opinion of such length that it would be useless to the profession, for the reason that no lawyer would ever read it. We shall, therefore, deal directly with the material issues in the case.

Otto O. Wright was an engineer in the service of defendant. At the time set out in the pleadings he was ordered to run an engine, No. 1486, as "an extra" from Fairbury to Albright, both points in Nebraska. In making this run he was required to pass through the city of Lincoln. After leaving the station at Lincoln, and while running north through the company's yards at a point a short distance from the Holdrege street viaduct, this extra collided with the company's switch engine No. 1220, which was used by the defendant in its Lincoln yards for switching purposes, causing the death of Mr. Wright. These two engines will hereinafter be referred to by their respective numbers. The point where the collision occurred was in a cut and on a curve. The controlling, and in fact the only real question involved in this case, is, who was to blame for this collision?

It is shown that the defendant had rules for the guidance of its employees, including engineers. On its printed time-tables, such as were then used by engineers, rule 16 provided: "All except first class trains will approach (enter, and pass through the following named yards under full control), expecting to find main track occupied or obstructed. Albright, Fairbury, Lincoln, Belleville, Jansen, Phillipsburg." Subdivision *b* of rule 9 provided: "The speed of trains in the city of Lincoln between M street (two blocks west of passenger station) and Vine street (east of coal dock) must not exceed six miles per hour." Rule 97*a* in the book of rules promulgated by defendant provided: "Yard limits will be indicated by yard limit boards. Within these limits yard engines may occupy main tracks, protecting themselves against overdue trains. Extra trains must protect themselves within yard limits." The term, "under full control," in rule 16, all of the witnesses testified means "to be able to stop within the vision of the engineer." It is conceded that 1486 was required, while passing through the company's yards in the city of Lincoln, to proceed under such control. It is uncontradicted that the defendant had no written or printed rule

relating to the rate of speed at which its switch engines might run within its yards. There is some testimony to the effect that there was some sort of an unwritten rule or understanding that switch engines should also be run under full control; but the evidence is entirely satisfactory, and not contradicted by any testimony offered by defendant, that defendant's switching crew did not consider that it was bound by any such rule, except as to that portion of the Lincoln yard between M and Vine streets, which portion was not only covered by subdivision b of rule 9, but also by a city ordinance. Defendant in its brief urges 13 assignments of error, which we will consider in their order:

The first assignment is that the verdict is not sustained by sufficient evidence. In considering this assignment, the place where the collision actually occurred is important. There is a viaduct on Holdrege street at the place where that street is intersected by defendant's track. Holdrege street runs east and west. The collision occurred north of the viaduct; 1486 was running north, and 1220 south. In going north, after leaving the viaduct, the track curves to the east in a cut. The collision occurred in that cut. The point where the collision occurred is testified to by the engineer, fireman, switch foreman, and two of the switchmen who were riding on 1220, McLane, the fireman on 1486, and by four witnesses who resided in the immediate vicinity, and who visited the scene immediately after the collision. All of these witnesses locate the point of the collision as right opposite or a few feet south of a barn standing on the first lot east of the track, which lot faces south on Holdrege street. This lot is 135 feet in depth. The four residents of the vicinity locate the collision a little south of the barn. McKinstry, a switchman on 1220, says that 1486, after the collision, was about 35 or 40 feet south of the building shown in the photographs, which is the barn referred to. Some of the switching crew testify that the collision occurred about 150 feet north of the viaduct. This testimony, however, was simply

the opinion of the witnesses so testifying. This testimony cannot be considered in the face of the large number of witnesses whose uncontradicted testimony locates the exact place where the collision occurred in front or a few feet south of a fixed object or point by the side of the track. Considering, therefore, the length of the lot upon which the barn stood and the point in relation thereto, where these residents show the collision occurred, there is no escape from the conclusion that the collision actually occurred at a point about 100 feet north of the viaduct.

It is admitted that all of the members of the switching crew knew that the extra 1486 was in the yard. McKinstry, the switchman above referred to, was the first to discover that the two engines were running towards each other on the main track. He testifies that he immediately gave the alarm. The men on 1220 testify that when McKinstry gave the alarm the engineer threw on the emergency brake. When 1220 had run about 75 or 100 feet, McKinstry and some of the others jumped from the engine. All of the crew, including the engineer, jumped, but whether the others jumped at the same time McKinstry and Carr did, is not shown. Possibly the engineer remained on a little longer. According to McKinstry and Carr, 1220 proceeded about 25 feet after they jumped, before the collision occurred, so that, according to their testimony, 1220 proceeded about 100 feet, after McKinstry gave the alarm, before the collision occurred. Some of the witnesses on 1220 testify that at the time McKinstry gave the alarm 1220 was running from three to five miles an hour; others say from three to four miles an hour; yet McKinstry and Carr both say that when the collision occurred 1220 was going "not to exceed three miles an hour." The witness Palmer, engineer on the company's switch engine at the time of the trial, testified that he was familiar with engine 1220, and had run it; that an engine running at a rate of five miles an hour ought to be stopped in 20 feet, at 10 miles an hour in 30 feet, at 15 miles an hour in 45 feet, and at 20 miles an hour in 60 feet. This

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testimony stands uncontradicted. It is thus clearly established that 1220 must have been running at a high rate of speed, or that the emergency brake was not applied and the engine reversed before the crew jumped from the engine. It is testified to by some of the crew of 1220, and conceded in the brief of defendant, that at the time McKinstry discovered 1486 approaching, it was at least 50 feet north of the viaduct. That fact being established, and also the fact that the collision occurred not over 100 feet north of the viaduct, it stands established as a fact that 1486 did not run to exceed 50 feet after its engineer, Wright, discovered the approach of 1220. A photograph introduced in evidence was taken at a point 420 feet north of the viaduct. It shows the barn above referred to, the cut and curve, and the rails of the track from that point to the viaduct, and clearly shows that at any point within that 420 feet two engines approaching from opposite directions would have a clear view of each other. 1486 being 50 feet north of the viaduct, it is beyond question that the point of view in the photograph could have been extended that number of feet farther north, so that there was a clear, open view of the track for the entire distance of 420 feet when the engines came within the vision of the two engineers. Of that 420 feet, 1486 only traveled about 50 feet when the collision occurred, while 1220 traveled 370 feet. As we view the record, there is no escape from these facts. This being true, then the conclusion is irresistible that the engineer of 1486 was proceeding north with his engine under full control; that the engineer of 1220 was proceeding south with his engine not under full control, but traveling at such a rate of speed that he was unable to stop it within a distance of 370 feet, and that, even after traveling that distance, his engine was still going at the rate of two or three miles an hour.

Mr. Burleigh, trainmaster for the Nebraska division of the defendant road, was called as a witness by defendant. Defendant's abstract of Mr. Burleigh's testimony sets out

only that part showing that engineers were examined by him as to their fitness, and as to the published book of rules; that he had examined Wright; that Wright had a clear understanding of the rules; that he informed Wright that switch engines had a right over all except first-class trains in yard, and that other trains would have to look out for them; that he read the rules to Wright, who gave him his understanding of the same as they were read; that Wright gave as his understanding of the term, "under full control," as meaning "to run at a speed which would make it impossible for two trains coming in opposite directions to collide with one another." That is not the meaning given by any other witness. If that be the meaning of the term, you could not run an engine at all without having a flagman in advance to warn you of approaching trains. An important part of Mr. Burleigh's testimony, not set out in defendant's abstract, appears in plaintiff's supplemental abstract: "Q. When you say you examine men for switch engines, do you use these rules? A. Yes; and the time tables. Q. You tell switch engine men that they have a right to run 25 miles an hour in the yards? A. Yes, sir. Q. You tell them that? A. If they want to—I don't tell them anything about running. Q. How is that? A. I don't tell them anything about how fast they shall run, or how slow. Q. You understand, of course, that they can at any time run their engines negligently? A. I understand that, yes."

Mr. Carr, the switch foreman, testified that when they went around that curve they always slowed up to save steam. "Q. But you went on the theory and assumed the right that everything had to get out of the way for you except this passenger? (By the term, 'this passenger,' the questioner meant a passenger train which was due to pass through a few minutes prior to the time of the collision, but which train was some 12 or 15 minutes late.) A. Yes, sir. Q. Although you knew the extra was in the yards? A. Yes, sir. * * * Q. Have you any rule applying to switch engines about running under control?

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A. No, sir." It will be seen, therefore, that in the defendant's yard the switch engine was a free lance as against all except first-class trains.

The second assignment is that the court erred in submitting the sufficiency and reasonableness of the company's rules to the jury. In the instructions complained of the court told the jury that the question as to whether the defendant was negligent in one or more respects alleged in the petition, as set out in subdivisions *a*, *b*, *c* and *d* of the first paragraph of the instructions, which stated the allegations of the petition, "is one of the material elements of plaintiff's cause of action to which the jury should direct their attention in determining upon their verdict. Negligence may be defined as the omission to do something which a reasonable man guided by those conditions which ordinarily regulate the conduct of human affairs would under the circumstances do, or doing something which a reasonable man would not do under the circumstances. In other words, negligence is the absence of care according to the circumstances." By instruction No. 8 the court instructed the jury: "Touching subdivision *a* of the first paragraph of these instructions, you are further instructed that it was the duty of the defendant company to exercise reasonable care to adopt and promulgate reasonable rules for the control and conduct of its business in all cases, in case its business had become sufficiently extensive to demand their adoption in the exercise of reasonable care for the protection of its employees. In this connection you are further instructed to determine from all the evidence in this case whether the defendant's rules with respect to the operation and control of its engines and trains, including its switch engines in the Lincoln yards, were reasonably sufficient for the protection of its employees at the time plaintiff's intestate sustained his injuries." Instruction No. 10: "You are instructed that under the rules of the company the light engine, which was being run by plaintiff's intestate as an extra, was required to run and pass through the Lincoln yards 'under

full control.' It is for you to say from the testimony what the term 'under full control' means, and then to apply your interpretation to the rules of the defendant company in which the term is used, and also to the acts of Otto O. Wright, in compliance with or failure to comply with such rules, in determining whether his acts were in compliance with or in violation of defendant's rules." Instruction No. 11: "If you find from the evidence that the defendant was negligent in one or more of the particulars alleged, and as set out in the first paragraph of these instructions, and if you further find from the evidence that such negligence proximately contributed to the injury of plaintiff's intestate, then you should direct your attention, among other things, to the defendant's claim that plaintiff's intestate was negligent, and also that he assumed the risks of his employment." The gist of defendant's complaint as to the foregoing instructions is that they submitted to the jury the reasonableness and sufficiency of the rules governing the operation of the switch engine in its yards. A number of authorities are cited by defendant in support of its contention. While we concede that in the main they sustain defendant's point that the reasonableness and, in some cases, the sufficiency of the rules are questions of law for the court, and not for the jury, this is not by any means the universal rule.

In *Southern R. Co. v. Craig*, 113 Fed. 76, the syllabus holds: "(1) Plaintiff's intestate, a railroad conductor on an extra train, had orders to precede a delayed regular train into defendant's yards. No instructions were given to look out for any other train on entering the yards. Intestate was killed in a collision with a switching engine in the yards. No notice of the approach of the extra train had been given to those on the switch engine. (In this case the switching crew had full notice of the presence of 1486 in the yard.) The company's rules, known to intestate, gave the right of way to switch engines in the yards, and required that extra trains must approach and run through yard limits under full control. The evidence

as to whether intestate's train was under full control was conflicting. The night of the accident was shown to have been dark and foggy. *Held*, That, notwithstanding the rules of the company, it was the duty of the crew of the switching engine to exercise ordinary care in avoiding collisions with incoming trains. (2) An instruction that the crew of the switching engine should take proper precautions against collisions with incoming trains, the character of such precautions to be determined by the circumstances of the night, the heavy fog, and the difficulty in hearing and seeing signals, was correct. (3) The question as to whether intestate observed the rule of having his train under full control on entering the yards was for the jury." In that case the company requested the following instruction: "Under the rules the switch engine had the right to the use of the main line, protecting itself against only regular trains. The extra was required to proceed through the yard under full control. This requirement applied, not only to the speed of the train, but to such precautions in addition as the dark and foggy night demanded. The switch engine having the right of way over the extra, it was the duty of the other to be on the lookout for the switch engine, and to take such precautions as the situation demanded to prevent a collision." The trial court modified the instruction by adding: "Yes; but it did not relieve the switching engine from the exercise of ordinary care in avoiding collisions with trains entering the yard." The defendant requested this instruction: "The rules of the company do not require notice of the movements of extra trains to be given to the crew of a switch engine working within the yard limits, and it is not negligence on the part of the defendant not to have given such notice," which the trial court modified by adding, "But the crew of the switching engine should take all proper precautions against collisions with trains entering the yard, the character of these precautions to be determined by the circumstances of the night, the heavy fog, and the difficulty in hearing and seeing signals." In the

opinion the court say (p. 79): "We find no error in the modifications made by the court in giving the instructions requested. After giving the first instruction requested, the court simply said, in substance, that it was the duty of the switching engine to exercise ordinary care in avoiding collisions with trains entering the yard. We cannot conceive of any circumstances under which the operators of a railroad train are relieved from the use of ordinary care to prevent collisions with other trains. This is a duty that devolves upon those running and operating trains at all times. What constitutes ordinary care depends upon the relationship of the parties and the circumstances under which they act, and what would be ordinary care or common prudence under certain conditions would not be under others." The judgment of the trial court was affirmed.

We think this reasoning is eminently sound, and its application to the switching crew in charge of 1220 is apparent. They knew the extra was in the yard. They had been expressly notified of that fact. They knew that when the extra moved farther through the yards it would be running on the main track, and for them to run their engine upon the main track, around the curve and through the cut at the rate of speed at which they were unquestionably running was a reckless disregard of the lives of those upon the engine of the extra. That they knew that they were liable to meet the extra is shown by what Switchman McKinstry said when he saw 1486 coming. His language was: "Get off; here comes that extra. * * * Q. Let me refresh your memory; did you say, 'There she is'? Did you use that language? A. I don't know whether I did or not. Q. How? A. I don't know whether I did or not; I just told them to get off, 'There comes the extra.'" A rule that a switch engine may run through the yards, on the main line, not under control, but at a high rate of speed, when its crew all know that there is an "extra" on the main line passing through the yards, would be a barbarous rule; and, if the rules of a railway company

permit such a practice, it should be held liable for injuries to employees on the extra who are injured while such extra is being operated in compliance with the rules of the company, viz., under full control. If the reasonableness of a rule is for the court, and not for the jury, the court should in such a case instruct the jury that such a rule is unreasonable. Submitting the question to the jury in such a case could not, therefore, prejudice defendant.

Directly upon the question of submitting to the jury the sufficiency of the company's rules, *Texas & P. R. Co. v. Cumpston*, 40 S. W. 546 (15 Tex. Civ. App. 493), is an instructive case. The fourth paragraph of the syllabus holds: "In an action for negligence of an employer in failing to provide rules, whereby an employee was killed, plaintiff need not allege or prove exactly what rules should have been made."

Mr. Labatt in his work on Master and Servant, vol. 1 (ed. 1904), sec. 228, in discussing the question of reasonableness, says: "Whether the reasonableness of a rule is a question for the court or the jury is one as to which there is much apparent conflict between the authorities. One theory is that this question is always for the court; the reason assigned for this view being that it would otherwise be impossible to secure a uniformity of view, or to insure that a rule pronounced reasonable in one case by a jury might not be pronounced unreasonable by another jury in a subsequent case. Another view is that the question is primarily one for the jury. Some courts have enunciated an intermediate doctrine which seems to be more in harmony with general principles, viz., that the reasonableness of a rule is a mixed question of law and fact, except in plain cases." The author cites numerous authorities in support of all three of the theories.

In *Crew v. St. Louis, K. & N. W. R. Co.*, 20 Fed. 87, it is held in the syllabus: "It is negligence on the part of railroad companies to fail to adopt such rules and regulations as are proper and necessary for the protection of

the safety of its employees." The trial court charged the jury: "I say generally that the railway company has a right, and it is its duty, to make rules for the protection of the safety of its employees, and such rules its employees are bound to regard and obey. But under the form of making rules, of course, a railroad company cannot exempt itself from negligence. Its rules must be such as tend to the protection of the lives of its employees. With this general statement in regard to the rules, you may take and consider them." The jury found for the plaintiff, and in an opinion by Brewer, J., the verdict was sustained, and the motion for a new trial was overruled.

In *Merrill v. Oregon Short Line R. Co.*, 29 Utah, 264, the syllabus holds: "(1) A master is under a primary and nondelegable duty to use ordinary care not only to promulgate, but also to enforce, reasonable rules and regulations for the safety of his servants, when the nature of the work requires it, and this duty is not performed merely by promulgating the rules, and using ordinary care in selecting men to enforce them. (2) The fact that the negligence of a fellow servant concurs with the negligence of the master in causing injury to a servant does not exempt the master from liability for his negligence." In the opinion (p. 279) it is said: "We think the evidence on behalf of respondents was quite sufficient to submit to the jury the question as to whether appellant used ordinary care, not so much, probably, in establishing and promulgating rules and regulations, but particularly in using ordinary care to enforce them. * * * The truth and the weight of this testimony were for the jury, which, if believed by them, was sufficient to find that ordinary care had not been used by the appellant in either establishing or in enforcing rules and regulations for the safety of its servants."

In *Murphy v. Hughes*, 40 Atl. 187 (1 Pennewill (Del.) 250), it is held: "The question as to whether an employer has made proper rules for the government of his employees is for the jury." In the opinion it is said (p.

188): "It is, however, always a question for the jury to determine whether such rules are sufficient for the purpose."

In *Devoe v. New York C. & H. R. R. Co.*, 66 N. E. 568 (174 N. Y. 1), the first paragraph of the syllabus reads: "Car inspectors, employed at a station at which there were many tracks and switches upon which a large number of trains passed every day, were required to inspect each car of each train while it was at the station, at which time there was much switching and moving of cars. Several inspectors had been injured in the performance of such duties, and many complaints had been made as to the dangerous character of the work. There was but one printed rule on the subject, which had never been enforced. *Held*, in an action for the death of a car inspector killed by the backing up of a train against the train under which he was working, that it was for the jury whether a parol rule, claimed to have been made by the foreman of the car department, without instructions from any one, was in use, and was sufficient, and properly promulgated under the facts."

In *Lake Shore & M. S. R. Co. v. Murphy*, 50 Ohio St. 135, it is held: "It is the duty of a railway company to afford reasonable protection to its employees against dangers incident to their work. *Railway v. Lavalley*, 36 Ohio St. 221, approved and followed. And if, under the circumstances of this case, a rule providing for warning was necessary, and by the exercise of reasonable care on the part of the company that necessity could have been foreseen, it was the duty of the company to prescribe such rule. Whether it ought to have so provided or not was a question for the jury."

In *Abel v. Delaware & Hudson Canal Co.*, 9 N. E. 325 (103 N. Y. 581), it is held: "In an action against a railroad company for damages for the death of an employee, a repairman, which occurred while he was engaged in repairing defendant's cars standing upon a side-track, which were run into by one of defendant's engines, it is

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for the jury to say whether or not defendant's rules providing for the safety of repairmen so employed are adequate for that purpose, and the court errs in ruling, as matter of law, that they are sufficient." In closing the opinion the court say (p. 326): "We do not perceive how it was possible to say, as matter of law, that the rules of the defendant were proper and sufficient for the protection of its repairmen, and that it should not have taken greater precautions, by rules or otherwise, for their safety. We think the facts should have been submitted to the jury, and that the nonsuit was improper." A judgment of reversal, therefore, followed.

In *Chicago, B. & Q. R. Co. v. McLallen, Adm'r*, 84 Ill. 109, the fourth paragraph of the syllabus holds: "A railway corporation has the lawful right to make reasonable rules for the conduct of its employees, and also for the conduct of passengers. Whether any given rule be reasonable, and therefore within the power of the corporation, or whether it be unreasonable, and therefore *ultra vires*, is a question of law for the court; but whether such rules are adequate for the safety of others, and the management of the trains, is a question of fact for the jury." In that case the decedent was a conductor in charge of an extra train, commonly called a "wild train." Plaintiff recovered a verdict and judgment for \$4,500, which was affirmed. In the light of the authorities above cited, to which others might be added, defendant's second assignment must be decided adversely to it.

The third assignment is that the court erred in submitting to the jury subdivison *b* of instruction 1, viz.: "In the failure to give said Wright timely warning by bell or whistle of the approach of said switch engine." The language above referred to was used by the court simply in stating the issues to the jury. Defendant has not called our attention to any other instruction where that language is used.

The fourth assignment is that the court erred in submitting to the jury the question whether defendant's em-

ployees upon the switch engine, as soon as they discovered the engine of plaintiff's intestate, jumped from their engine without reversing the same and without trying to stop. Counsel say this question should not have been submitted to the jury, for the reason that the undisputed testimony in this record of the witnesses introduced by both plaintiff and defendant is that, at the very first moment the presence of 1486 was known, the engineer applied all the apparatus on the engine to stop it, and actually did stop it in a very short distance. The trouble with this contention is that the undisputed evidence does not show, absolutely, that the engineer applied all the apparatus on the engine to stop it; but, instead of showing that he actually did stop it, the evidence shows that it had not stopped when the collision occurred. This question was properly submitted to the jury.

The fifth assignment is that the court erred in submitting to the jury the question as to whether defendant was guilty of negligence in running the switch engine around a curve at a negligent and dangerous rate of speed without having the same under control. What we have said under the first assignment disposes of this adversely to defendant.

The sixth assignment is that the court erred in giving instruction No. 10. This instruction has already been set out and disposed of under the second assignment.

The seventh assignment is that the court erred in giving instruction No. 13: "As to the defense of contributory negligence, and also as to the defense of assumption of risks, the burden of proof is upon the defendant to establish both of said defenses by a preponderance of the evidence, as those terms have been hereinbefore defined." There was no error in this instruction. *Grimm v. Omaha E. L. & P. Co.*, 79 Neb. 395; *Dowd v. New York, O. & W. R. Co.*, 170 N. Y. 459; *Arenschield v. Chicago, R. I. & P. R. Co.*, 128 Ia. 677; *Mace v. Bodker & Co.*, 127 Ia. 721.

The eighth assignment is that plaintiff's intestate was guilty of gross negligence. We spend no time in discuss-

ing this assignment as there is an entire absence of evidence to show any negligence on the part of plaintiff's intestate.

The ninth assignment is the legal sufficiency of the evidence for the court. In discussing this assignment, counsel say that in the trial court counsel for plaintiff relied on the Nebraska Employers' Liability Act (Comp. St. 1911, ch. 21, secs. 3-5), which modifies the defense of contributory negligence. What we have said in answer to the eighth assignment is a sufficient answer to this. There was no contributory negligence on the part of plaintiff's intestate. This also disposes of the tenth assignment.

The eleventh assignment is that the verdict was the result of passion and prejudice, and is excessive. The evidence shows that the decedent was a man of good health, 32 years of age; that he was earning from \$125 to \$150 a month; that his expectancy, according to the Carlisle table, would be 32 years. We cannot say that \$15,000 is an excessive judgment for the death of a man under these circumstances.

The twelfth assignment is that the decedent assumed risk of collision with switch engines. We think counsel for the plaintiff answer this contention in plaintiff's brief, where it is said: "Engineer Wright assumed the risks ordinarily incident to the business he was engaged in, but he did not assume any negligence of the defendant, and certainly did not assume the reckless conduct of the switch engine on this particular day."

The thirteenth assignment is that the court erred in submitting the case under the Employers' Liability Act. The contention under this assignment is that engine 1486 was on its way from Fairbury to Council Bluffs, Iowa, and hence Wright "was engaged in interstate commerce." It is probably true that, if Mr. Wright was engaged in interstate commerce at the time he was killed, the remedy would be under the federal act exclusively, but the trouble with this contention is, neither Mr. Wright nor engine 1486 was at the time engaged in interstate com-

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merce. His order was to take this engine from Fairbury, in Nebraska, to Albright, in Nebraska. He was running the engine without cars or train of any sort. The engine, so far as we can gather from the record, was defective, and was on its way to the car shops for repairs. In *Chicago & N. W. R. Co. v. United States*, 168 Fed. 236, the circuit court of appeals for this circuit held: "The necessary movement of a defective empty car alone, for purpose of repair only, and not in connection with any cars commercially used, does not subject the carrier to the penalties of the acts." A similar holding was made by the same court in *United States v. Rio Grande W. R. Co.*, 174 Fed. 399. The same rule will, of course, apply to an engine.

We have given this case very careful consideration. We have examined the record with great care, and are unable to find in it any prejudicial error. The judgment of the district court is therefore

AFFIRMED.

HAMER, J., dissenting.

1. Whether the defendant railway company formulated and promulgated any written or printed rule regulating the rate of speed that its switch engines might be run in the yards at Lincoln does not present any question of negligence for the jury to consider, unless in this particular case this part of the track run over was so run over by the switch engine at an unreasonable rate of speed, considering all the circumstances, and especially that this part of the yards was in a cut in a curve of the road, and so might have imperiled the safety of plaintiff's decedent. As the jury were not so told, and were not properly instructed touching the question, I am under the impression that there is prejudicial error in the proceeding and in the instructions given, as also in the third paragraph of the syllabus of the majority opinion. Whether the railroad company did or did not lay down a rule for the guidance of its employees concerning the rate of speed at

which the switch engine should be run in the yards is immaterial, unless it is shown by the evidence that the switch engine was run too fast and had such an unreasonable rate of speed as to endanger the safety of the decedent. The third paragraph of the syllabus is objectionable.

2. It must be all a matter of speculation, in the absence of any rule, that if a reasonable rule had been made by the railroad company touching the running of the switch engine in its yards it would have controlled, or even influenced, the conduct of the crew in running such switch engine. For this reason, the theory of the opinion seems to be wrong.

3. By instruction No. 8 the court instructed the jury: "Touching subdivision *a* of the first paragraph of these instructions, you are further instructed that it was the duty of the defendant company to exercise reasonable care to adopt and promulgate reasonable rules for the control and conduct of its business in all cases, in case its business had become sufficiently extensive to demand their adoption in the exercise of reasonable care for the protection of its employees. In this connection you are further instructed to determine from all the evidence in this case whether the defendant's rules with respect to the operation and control of its engines and trains, including its switch engines in the Lincoln yards, were reasonably sufficient for the protection of its employees at the time plaintiff's intestate sustained his injuries." The effect of this instruction would seem to be to turn the jury loose in the field of speculation as to whether the railroad company might not have improved its rules touching the protection of its employees, and if for any reason it had not done so, that it is liable in this case. The trouble with this sort of thing is that the attention of the jury is not called to any specific thing which may have contributed to the death of plaintiff's decedent.

It is well said in the majority opinion: "A rule that a switch engine may run through the yards, on the main

line, not under control, but at a high rate of speed, when its crew all know that there is an 'extra' on the main line passing through the yards, would be a barbarous rule; and, if the rules of a railway company permit such a practice, it should be held liable for injuries to employees on the extra who are injured while such extra is being operated in compliance with the rules of the company, viz., under full control. If the unreasonableness of a rule is for the court, and not for the jury, the court should in such a case instruct the jury that such a rule is unreasonable." I apprehend that the railway company may make no rule which would relieve the crew of the switching engine from exercising ordinary care and common prudence to avoid a collision, but the language used in the instruction quoted is of a most general character. That turns over to the jury the question of determining whether a better set of rules might not have been constructed, and, if so, then the inference is that it is the duty of the jury to find that the defendant is liable. I do not think that this can be the law. If the jury is turned loose and told that it may occupy as wide a province as it likes, it will be almost sure to find that other and better rules might have been made. When it is remembered that jurors are not specially instructed along the line of operating railways and formulating rules for their management, it must be seen that the instruction is an invitation to pursue any theory which may present itself to the imaginative mind of the juror.

The first case cited in the majority opinion is that of an inferior court. The Texas case cited does not seem to be clearly in point. The other cases cited do not seem as broad as the instruction in the instant case.

4. Instruction No. 9, requested by the defendant, reads: "You are further instructed that the defendant was not required to insure its locomotive engineers from collisions with switch engines or other like accidents resulting from the management of trains; that defendant's duty to the employees was only to use reasonable care and diligence

in the management and operation of its switch engines, and unless you find that the defendant, or its agents and employees, failed to use reasonable care and diligence in the management of its switch engine, and as a consequence thereof plaintiff's intestate was injured, you cannot find for plaintiffs." I think the above instruction requested by the defendant should have been given.

5. It was according to the theory of the defendant's case that the plaintiff's intestate was running his engine at a rate of speed so great as not to be under full control, and that this was the proximate cause of the injury. Touching this matter, the defendant requested the giving of an instruction as follows: "Instruction No. 13. You are instructed that the company has promulgated and published rules governing the operation of locomotive engines and trains in the Lincoln yards; and that, under said rules, Otto O. Wright was bound to run his engine through the Lincoln yards under full control. You are instructed that an employee, if within his power so to do, is bound to obey all of the reasonable rules and instructions of his employer with reference to the conduct of his business, and if you find from the evidence that at or immediately before the accident, when the engines first came in sight of each other, the said Otto O. Wright was running his engine at a rate of speed so as not to be under full control, and that this was the proximate cause of the injury, then you are instructed that plaintiffs cannot recover." I think it should have been given.

For the foregoing reasons, I dissent from the majority opinion.

AUGUST HENKEL, APPELLEE, v. WILLIAM BOUDREAU ET AL.,
APPELLANTS.

FILED SEPTEMBER 26, 1913. No. 17,242.

1. **Judgment: FORMER ADJUDICATION: DISMISSAL.** Where, in a petition on the commencement of an action, several persons are named as plaintiffs, and before issue is joined by answer leave is given to file an amended petition, and the name of one of the plaintiffs is, without any order of the court, dropped from said amended petition when filed, and the items set forth in the original petition, for which the plaintiff, so dropped, alone could recover, are also dropped from the amended petition, and thereafter defendants answer the amended petition, and plaintiff replies to such answers, and the case proceeds to trial upon the issues so joined, and no claim or demand of the plaintiff, so dropped from the amended petition, is adjudicated upon such trial, such action cannot be urged as a bar to plaintiff's right to maintain a separate action in his own name, based upon his individual cause of action.
2. **Appeal: REVIEW.** Where the record upon which a case is submitted to this court contains no motion for a new trial, the only question which will be considered will be the sufficiency of the pleadings to sustain the judgment.
3. **Intoxicating Liquors: ACTION FOR DAMAGES: SUFFICIENCY OF PETITION.** Upon the authority of *Buckmaster v. McElroy*, 20 Neb. 557, the petition in this case is held to state a cause of action and to be sufficient to sustain the judgment.

APPEAL from the district court for Franklin county:
HARRY S. DUNGAN, JUDGE. *Affirmed.*

L. H. Blackledge and A. H. Byrum, for appellants.

M. A. Hartigan and W. H. Miller, contra.

FAWCETT, J.

The substance of the petition is that on January 14, 1908, plaintiff, then a man 48 years of age, by occupation a farmer, was in good health and successful in his occupation and business, from which he received annually the sum of \$1,000 and upwards; that the defendants William Boudreau and Leonel Boudreau were then engaged in the

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licensed sale of intoxicating liquors; that the defendant United States Fidelity & Guaranty Company is a bond and surety company; that for the purpose of securing licenses for engaging in said liquor business the company executed its bonds for said defendants; that on the date named, and for more than a year prior thereto, the defendants were engaged in the sale of liquors, were well and intimately acquainted with plaintiff, and during said time they gave and supplied plaintiff with intoxicating liquors in quantities and amounts, and continuously from time to time and so frequently and often that plaintiff became an habitual and confirmed drunkard; that on the date named plaintiff purchased and received from the defendants and drank the liquors so purchased until he became helplessly intoxicated; that when so intoxicated he attempted to drive his team home; that by reason of said intoxication caused by defendants he lost control of his horses and they ran away, throwing plaintiff from his wagon and so injuring him that it was necessary to amputate his right arm near the shoulder; that by reason of the injury, in addition to his confirmed habits and disease so fixed upon him by the use of the liquors sold and given to him by the defendants, plaintiff is unfit to carry on his usual occupation of a farmer; that he is permanently and effectually crippled for life; that it became necessary for plaintiff to employ surgical and medical services and to pay therefor the sum of \$350; that plaintiff also incurred and paid out large sums for medicine, nursing and care in the further sum of \$350; that by reason of the injuries aforesaid he is permanently crippled and injured for life, to his loss and damage in the sum of \$15,000, for which amount he prays judgment.

One Frank Robbins was also joined as a defendant, but by direction of the court he was released from liability.

The defendants answered separately, but in like terms, in which answers they deny all allegations not admitted to be true; allege that the petition does not state facts sufficient to constitute a cause of action; that any injury

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plaintiff received was the result of his own negligence; that if plaintiff was intoxicated at the time of the injury he voluntarily, by his own desire and by his own acts, became in such condition, and not by the desire, request, influence or contribution of the defendants. The answers further allege that plaintiff, his wife, Sophie Henkel, and five children recovered judgment in March, 1909, for \$4,000 against the answering defendants for the aforesaid injuries, "which action is now pending on appeal in the supreme court of Nebraska." The reply is a general denial. There was a trial to the court and a jury. Judgment was entered against the defendants in favor of plaintiff for \$1,500. Defendants appeal.

The defendants insist that plaintiff was a party plaintiff in the suit by Sophie Henkel, his wife, against these defendants, as set out in their answers, and that whatever claim he may have had against the defendants was finally adjudicated in that case. This contention is based upon the ground that plaintiff never was dismissed out of that case, as it was originally commenced, either by order of the court or by any action of record of plaintiff himself. That case went to judgment, and was appealed to this court, where the judgment was affirmed. *Henkel v. Boudreau*, 88 Neb. 784. It is undisputed that when that case was originally commenced the plaintiffs named in the title to the case were Mrs. Henkel, the five children, by Mrs. Henkel as their next friend, and August Henkel, plaintiff in this case. Defendants assailed the petition upon various grounds, and leave was given plaintiff to file an amended petition. In the amended petition August Henkel's name was dropped. The opening paragraph of the amended petition recites: "The plaintiff complains of the defendants and for cause of action shows unto the court in her own right and as well as the next friend for her minor children as follows," etc. In the amended petition specific items, which the original petition counted on in favor of August Henkel, are omitted. When defendants answered in that case, they answered the amended peti-

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tion, and not the original, and therefore knew at the time they answered that August Henkel had dropped out of the case, and that no demand was being made for any recovery for him. That was the case tried, and that was the case presented in this court. The opinion by our then and present chief justice shows that no claim of August Henkel was litigated or decided. But, counsel say August Henkel was in the original case, and ask: "If so, how and when did he make his exit?" It is then argued that he could only get out of that case by a formal dismissal either by order of the court or by his own motion, and cases from Kansas are cited to sustain this contention. One of those cases is sufficient to refer to. In *Allen v. Dodson*, 39 Kan. 220, the first paragraph of the syllabus holds: "An action cannot be dismissed by the plaintiff by entry to that effect on the appearance docket. It is in the nature of a judgment, and requires the order of the court."

In *Grimes v. Chamberlain*, 27 Neb. 605, this court held: "An action may be dismissed without prejudice to a future action by a plaintiff before the final submission of the case to the jury or court where the trial is to the court (sec. 430 of the civil code); and such dismissal may be made at the option of the plaintiff without leave of the court. It is a right specially given by statute which the court has no power to refuse."

Under the authority of the above case, August Henkel had a perfect right, before the original case was submitted, and certainly before issue had been joined, to dismiss that case so far as he was concerned. The formal way would have been to have obtained an entry on the docket of the court showing such dismissal, but, the case having subsequently been tried on issues joined between the defendants and the remaining plaintiffs, the irregularity, if it be such, cannot now be urged. An examination of the instructions in the abstract before us shows that the trial court carefully safeguarded the defendants against any possibility of allowing plaintiff to recover for anything for

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which his wife and children recovered in the other case. The irregularity was therefore without prejudice, and under section 145 of the code constitutes no ground for reversal.

This case was filed in this court while the abstract law was in force, and was submitted upon an abstract prepared by defendants. So far as the abstract shows, no verdict was ever returned by the jury. The abstract does not inform us why no verdict was returned, nor does it set out any motion for a new trial. All that it states is: "December 24, 1910, separate motions for new trial were made by Leonel Boudreau and the United States Fidelity & Guaranty Company. Motions were severally overruled and exception taken, and judgment was rendered by the court." In this condition of the record, all that we can consider is the sufficiency of the pleadings to sustain the judgment.

That the petition states a cause of action is the settled law of this state. *Buckmaster v. McElroy*, 20 Neb. 557. This opinion is vigorously assailed by counsel, but it has been frequently referred to and followed in subsequent decisions by this court. Counsel say that the case has been much criticised by other courts and text-writers, and also by this court. It is true the decision in that case was criticised in a dissenting opinion by one member of the court at the time it was decided. The subsequent criticism by this court, to which counsel refers, is evidently the statement by Judge POST in *Curtin v. Atkinson*, 36 Neb. 110, where the judge says: "And in *Buckmaster v. McElroy*, 20 Neb. 557, it was held that one who had suffered injury in consequence of his own voluntary intoxication may recover on the bond of the saloon-keeper from whom the liquor was procured. We are not disposed to recede from the position taken in previous decisions, notwithstanding the last-named case has been the subject of no little criticism, particularly by Mr. Black in his recent work on Intoxicating Liquors, sec. 291. But to further extend the liability of the saloon-keeper would be a palpable misconstruction of the liquor law and an unmistak-

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able encroachment upon the powers of the legislature." It will be seen from this quotation that this court has deliberately considered the criticisms passed upon *Buckmaster v. McElroy*, yet, notwithstanding such criticism, it has adhered to that case. Further comment upon that point is unnecessary.

As above stated, the petition states a cause of action. We have examined the instructions given by the court and find that they respond to the issues tendered by the pleadings. There is nothing before us to show that the motion for a new trial, which counsel say was filed, challenged the correctness of any of the instructions, or any of the rulings of the court during the trial, or the sufficiency of the evidence to sustain the verdict. This being true, there is nothing left for us to do but affirm the judgment.

AFFIRMED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

JESSIE E. BOLTON, APPELLEE, v. HENRY BOLTON,
APPELLANT.

FILED SEPTEMBER 26, 1913. No. 17,313.

DIVORCE: EXTREME CRUELTY: EVIDENCE. Evidence examined, and referred to in the opinion, held sufficient to entitle plaintiff to a divorce on the ground of extreme cruelty.

APPEAL from the district court for Colfax county: CONRAD HOLLENBECK, JUDGE. *Affirmed as to defendant's cross-petition, and reversed as to plaintiff's petition, and remanded, with directions.*

C. J. Phelps and George W. Wertz, for appellant.

W. M. Cain and M. F. Harrington, contra.

FAWCETT, J.

This suit was instituted by plaintiff in the district court for Colfax county, for a divorce on the ground of extreme cruelty. Defendant answered, denying all of the acts of cruelty, and alleging adultery on the part of plaintiff, and prayed for a divorce on that ground. Plaintiff then filed an amended petition, alleging the same matters set out in her original petition, and adding other and more serious acts of cruelty. After an extended trial, in which a large amount of testimony was taken, the district court found that neither the acts of cruelty charged in the petition nor the charge of adultery set out in defendant's answer and cross-petition had been sustained by sufficient evidence, and dismissed both the petition and cross-petition. Defendant appeals, and plaintiff prosecutes a cross-appeal.

It would serve no good purpose to set out the testimony offered on both sides of this unfortunate case. We have examined the evidence with great care, and have reached the conclusion that the findings and judgment of the court in favor of plaintiff as to defendant's cross-petition should be affirmed, but that the charge of cruelty contained in the fifth paragraph of plaintiff's amended petition is sufficiently sustained to entitle her to a divorce. We are the more ready to so hold because we think that in this case the legitimate ends and object of matrimony have been utterly destroyed, and that these two people can never again live together as husband and wife.

The amended petition alleges that defendant is the owner of a quarter section of land in Colfax county of the value of \$16,000, a stock of merchandise in the city of Schuyler of the value of \$15,000, a stock of merchandise in the village of Dodge of the value of \$5,000, a quarter section of land in Perkins county of the value of \$7,000, and bank stock of the value of \$2,000—total \$45,000. The defendant in his answer admits the ownership and value of the stock of merchandise in the city of Schuyler, but

alleges that he is indebted therefor in the sum of \$5,000; admits the ownership and value of the Colfax county land, but alleges that it is encumbered in the sum of \$8,000; admits the ownership of the Perkins county land, but denies that it is worth \$7,000, and alleges that its value is but the sum of \$3,200; admits the ownership of the bank stock, but denies that it is of the value of \$2,000, and alleges that it is of the value of only \$1,000, and is encumbered in the sum of \$500; and further alleges a general indebtedness, in addition to the items above enumerated, of \$5,000. No proof was offered by either party as to the value of the property or as to any indebtedness thereon.

Counsel for plaintiff insist that in this state of the record no deductions can be made for indebtedness; that defendant having alleged an indebtedness, but having given no evidence in support of his allegation, "this court must find conclusively that he is not in debt." We are inclined to agree with counsel for plaintiff in this contention, but it is unnecessary to determine the point, for the reason that the allowance of alimony is a question resting largely in the sound discretion of the court awarding the same, and the court is not absolutely bound by the exact figures showing the amount of the husband's property. The parties to this suit had only been married about eight years. So far as the evidence shows, defendant had accumulated substantially all of his property before he married plaintiff. She is not, therefore, entitled to the same allowance out of his estate as she would be if they had started life together and had jointly accumulated the property. Considering all of the allegations pro and con as to the value of the property, and all of the facts and circumstances shown in evidence, and considering the ages of the parties, we think an allowance of \$6,000 as permanent alimony would do substantial justice between the parties.

The judgment of the district court is therefore affirmed as to defendant's cross-petition, and reversed as to plain-

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tiff's petition, and the cause is remanded to the district court, with directions to enter a decree granting plaintiff a divorce on the ground of extreme cruelty, and awarding her the sum of \$6,000 as permanent alimony; defendant to pay all costs.

JUDGMENT ACCORDINGLY.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

LINCOLN REALTY COMPANY, APPELLEE, v. GARDEN CITY
LAND & IMMIGRATION COMPANY, APPELLANT.

FILED SEPTEMBER 26, 1913. No. 17,322.

1. **Statute of Frauds: CONTRACT: MODIFICATION.** Where a contract is one required by the statute to be in writing, there must be a consideration for a modification by waiving some of its requirements, or else such new agreement must be in writing.
2. **Brokers: COMMISSION: WHEN DUE.** In a written contract of agency for the sale of real estate, which provides that the agent's commission shall be "due and payable when deal is closed," such commission is due and payable when the agent has brought his principal and a purchaser together, and the principal and purchaser have fully negotiated and agreed upon a sale and purchase, and have entered into an executory contract for the performance of such agreement.
3. **The instructions examined, and set out in the opinion, held free from prejudicial error.**

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed.*

C. Petrus Peterson, Albert Hoskinson and R. W. Hoskinson, for appellant.

T. J. Doyle and G. L. De Lacy, contra.

FAWCETT, J.

From a judgment of the district court for Lancaster

county, in favor of plaintiff for commissions earned in an alleged sale of lands for defendant, defendant appeals.

The petition sets out the following contract: "Lincoln, Neb., Nov. 13, 1909. We the undersigned agree to pay the Lincoln Realty Co., of Lincoln, Neb., a commission of \$3 per acre on all lands sold by them, said commission to be based on our regular selling terms, one-half cash of said purchase price, said lands owned and controlled by us in Finney and Scott counties, Kansas, said commission due and payable when deal is closed. Such parties to have the following territory: Lancaster, Otoe, Saunders, Seward, Saline, Gage and Jefferson counties, and Cass county. The Garden City Land & Immigration Co., by H. J. Wells. H. J. Wells, 407 Commerce Bldg., Kansas City, Mo."—and alleges that plaintiff sold 320 acres to J. D. Heugel, 160 acres to J. O. Greenawalt, 160 acres to H. W. Strock, and 400 acres to Clarence Shumway, "all of said lands being located in Scott county, Kansas, and sold under the terms and conditions of the contract;" that there is due plaintiff a balance on account of such commission of \$2,040, for which judgment is prayed, with interest from March 8, 1910. For answer to the petition as to the sale to Heugel, defendant alleges that the sale was in part a trade or exchange, in which, "in part payment of the purchase price, there was conveyed by the purchaser to the defendant two houses and lots in Lincoln, Nebraska, and the balance of the purchase price, \$3,600, was paid by the purchaser in cash;" that it was agreed between plaintiff and defendant "at the time of said sale" that one of said two houses and lots should become the property of the defendant, and the other the property of the plaintiff and one Wells, and that when the last-mentioned lot should be sold the proceeds of said sale should be divided equally between plaintiff and Wells, and the other house and lot remain the property of defendant; that the two houses represented all the profit there was to the defendant in the sale of the land to Heugel, and in consideration of that fact it was agreed

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that plaintiff should accept one of the said houses and lots in full of its commission for the sale of said land and for the services rendered by said Wells in making said sale; that, after the sale of the land had been negotiated and the terms of sale agreed upon, plaintiff sent to defendant a written contract to be signed by defendant, but did not then disclose that plaintiff had received \$200 on account of the purchase price, and that at the time defendant signed the contract it did not know of such payment to plaintiff; that defendant signed the contract, and its president took the same to Lincoln to close up the deal, and there, in the presence of the purchaser, the president of defendant stated that the amount of cash to be paid was \$3,600, whereupon Heugel stated that he had already paid \$200, and there only remained to be paid in cash \$3,400, which statement plaintiff verified; that Mr. Harris, of plaintiff company, admitted he had received said \$200 in cash, and that he took a check for \$3,400, the balance of the purchase price which had been given to Heugel; that thereupon the president of defendant demanded of plaintiff the said \$3,600, the full amount of the cash purchase price, which plaintiff refused to pay, "but the plaintiff did pay to the defendant the sum of \$3,120, and kept and retained the balance of said purchase price, \$480, which sum the plaintiff owes the defendant, with interest thereon from the date of its receipt by the plaintiff;" that immediately or shortly after the defendant received from plaintiff said sum of \$3,120, the contract between plaintiff and defendant was by mutual consent canceled, and since that date, "which was about one week after the deal covering said half section of land was closed, the plaintiff has never been the agent of the defendant;" and denies each and every allegation in the petition not specifically admitted. It will be seen that the answer as to the three deals last above named is a general denial only. The reply is a general denial.

We will consider first the Heugel deal. As to this deal,

the assignments of error are that the court erred (1) in excluding evidence of a subsequent oral agreement with reference to compensation to plaintiff for negotiating this deal, and (2) in giving instruction 7 and 8, which direct a verdict for plaintiff as to their claim by virtue of the Heugel deal. A fair construction of the answer would be, and the evidence conclusively shows, that this deal was fully consummated and the transfer made. The evidence as to any modification of the contract with reference to commissions is in direct conflict. The testimony of plaintiff that no such modification was ever made is quite strongly corroborated by the fact that, when the deal was consummated, the deed to the two houses and lots, one-half of one of which the defendant claims plaintiff was to receive as full compensation for its services, was taken in the name of the president of defendant, and by him subsequently conveyed to one Clark, who, the president testifies, "was trustee for what we called the 'syndicate' in handling these lands." No deed has ever been executed or tendered to plaintiff for either of said lots or any portion thereof. On the trial of the case the court, on plaintiff's motion, struck out the testimony which had been given by the witness Wells, in behalf of defendant, pertaining to the question of a modification of the written contract by the alleged oral agreement to take the house and lot in lieu of the commission provided for by the written contract, on the ground that the statute of this state requires a contract of brokerage to be in writing, stating the amount of commissions, and that the alleged oral arrangement is void under the statute, "and incompetent to vary them." Instructions 7 and 8, complained of, were to the same effect. In No. 7 the jury were told that the evidence, touching the agreement to accept the house and lot in lieu of commission, should not be regarded by them, as such contract was void, not being in writing; and in No. 8 they were told that defendant was not entitled to recover upon their counterclaim for \$480, being one-half of the commission upon the Heugel deal,

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as stated in the written contract. In the ruling excluding testimony referred to, and in the instructions given, the district court did not err. The rule is correctly stated in the second and third paragraphs of the syllabus in *Bowman v. Wright*, 65 Neb. 661, as follows: "(2) While executory and before a breach, the terms of a written contract may be changed by a subsequent parol agreement; and such subsequent agreement requires no new consideration. (3) Where, however, the contract is one required to be in writing by the statute of frauds, there must be consideration for a modification by waiving some of its requirements, or else such new agreement must be executed." No consideration for the alleged oral modification of the contract is either alleged or proved. The allegation that the two houses represented all the profit that there was to the defendant in the sale of the land to Heugel cannot be urged as a consideration passing to plaintiff for the surrender of \$960 of commission, and taking in lieu thereof one-fourth interest in the Heugel lots, which the witness Wells, in behalf of defendant, testified Harris told him were worth about \$2,700.

As stated in the brief of counsel for defendant, "the three remaining transactions call for an interpretation of the agency contract with reference to the time when commissions are due." The contention made by defendant is that the words in the contract, "said commission due and payable when deal is closed," mean when the deal is finally consummated by the actual transfer of the property by the defendant to the purchaser secured by plaintiff; while plaintiff's contention is that those words mean that the commission is due and payable when plaintiff has done everything there is to be done by it; that is to say, when it has brought the purchaser and seller together, and a sale by them has been fully negotiated and agreed upon, and an executory contract for the performance of that agreement entered into between the seller and purchaser. We think the plaintiff's contention is sound and should be sustained.

This holding, we think, disposes of the case as to the Greenawalt, Strock and Shumway deals. The evidence shows that the Shumway deal was actually consummated. No consideration, therefore, need be given to that. As to the Strock deal, it is shown that a sale was made to Strock and an executory contract executed by him. He was ready and willing to consummate the deal, but the president of the defendant refused to go with him to the bank, where Strock testifies he had his money, and the cashier of which bank Strock desired to look over the papers. His testimony is positive to the point that he requested the president of defendant, who was in the small town where the bank was doing business, having come there for the purpose of consummating the deal, to go with him to the bank, and that the president refused. This testimony is contradicted by the president. There is no evidence that defendant tendered Strock a deed, but the president left town, according to Strock's testimony, without making any further attempt on his part to consummate the deal, and no deed was ever given Strock for the land purchased by him. Upon this branch of the case the court instructed the jury that the evidence disclosed that plaintiff procured and introduced Strock to the defendant; that Strock and defendant entered into a valid contract of sale for the land involved in that deal; that no deed was ever made and delivered to Strock for the property; that defendant did not receive from Strock the purchase price of said property; and that "the jury are instructed, if they find from the evidence that the said Strock, the purchaser, was financially able to carry out the terms of the said contract, then the failure to carry out that contract does not deprive the plaintiff of the right to the commission contracted for, and in this case, if the jury find that the said Strock was able to carry out the terms of said contract, its findings should be for the plaintiff for the sum of \$480." The court was partially in error in stating that the defendant did not receive from Strock the purchase price of the property. It had not received the whole

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purchase price, but it had received from Strock a note for \$2,500, which at the time of the trial it still held and had never offered to return. If Strock was able to carry out the contract, he could, under his executory contract, have been compelled to do so, but, instead of insisting upon performance by him, defendant never offered performance on its part. We think further discussion of this deal is unnecessary.

As to the Greenawalt deal: This appears to have been to some extent an exchange of property. Defendant was to accept from Greenawalt three lots in the town of Day-kin and a stock of merchandise. When the deal was agreed upon, an executory contract was entered into between defendant and Greenawalt. Mutual abstracts of defendant's land and Greenawalt's lots were made, examined and approved. The inventory of the Greenawalt stock of merchandise was made by Mr. Harris, of plaintiff company, at the request of Mr. Hope, president of defendant. Mr. Harris testifies that no objection was made to the same. There is no contention made in this case that there was to be any rebate or modification of commission. Upon this branch of the case the court instructed the jury that, if they found from the evidence that the defendant refused to carry out the terms of the contract with Greenawalt, upon such refusal taking place, plaintiff would be immediately entitled to the commissions contracted for in his contract, unless the refusal by defendant to carry out the contract was for the reason that Greenawalt was unable to perform on his part. There is no conflict in the evidence that Greenawalt was ready and willing and entirely able, and had prepared his deed, ready to complete the contract.

We have been unable to discover any prejudicial error in the record. The judgment of the district court is therefore

AFFIRMED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

DENNIS H. CRONIN, APPELLANT, v. DANIEL J. CRONIN ET AL., APPELLEES.

FILED SEPTEMBER 26, 1913. No. 17,654.

1. **Appeal: LAW OF THE CASE.** The determination of questions presented to the supreme court becomes the law of the case, and, ordinarily, will not be re-examined when the case is again brought up for review.
2. **Taxation: PUBLICATION OF DELINQUENT TAX LIST: NEWSPAPERS: ORDER OF COUNTY BOARD.** A motion adopted by a county board that "the printing of the scavenger delinquent tax list was awarded to the O'Neill Frontier," *held*, not a designation of such newspaper as the one in which subsequent notices in the same suit should be published.
3. **Appeal: RULINGS: HARMLESS ERROR.** "To warrant the reversal of a judgment it must affirmatively appear from the record that the ruling with respect to which error is alleged was prejudicial to the rights of the party complaining." *Dobry v. Western Mfg. Co.*, 58 Neb. 667.
4. ———: **VERDICT: INADEQUACY.** The verdict of a jury will not be set aside on the sole ground of inadequacy of amount, where it appears that substantial justice has been done.

APPEAL from the district court for Holt county: JAMES J. HARRINGTON, JUDGE. *Affirmed.*

Brome & Brome and *W. K. Hodgkin*, for appellant.

McGilton, Gaines & Smith and *Arthur F. Mullen*, *contra.*

FAWCETT, J.

This is the fourth time we have been called upon to decide some phase of this controversy. *State v. Cronin*, 75 Neb. 738; *Miles v. Holt County*, 86 Neb. 238; *Cronin v. Cronin*, 88 Neb. 141. Reference is made to those opinions for a history of the controversy, and to the last of said opinions for a statement of the issues tendered by the petition in this action. An examination of that opin-

ion will show that when this action was commenced a general demurrer was interposed to the petition and sustained by the district court. Upon appeal to this court, the petition was carefully examined, and, as shown in the opinion by SEDGWICK, J., was held good, and the judgment of the district court reversed. Upon the trial of the case to a jury upon the merits, the district court, on motion of defendants, over the objection of plaintiff, dismissed plaintiff's second cause of action. The trial resulted in a verdict for plaintiff on his first cause of action for \$1,011.66. From this judgment plaintiff appeals.

Defendants ask us to review our decision on the former hearing as to the sufficiency of the petition. The petition was then carefully examined, and, without division of the court, was held to be sufficient. We therefore apply the rule that that decision became the law of the case.

Plaintiff's first assignment of error is that the court erred in dismissing his second cause of action. From a reading of the history of the case in our former opinions above cited, it will be seen that this controversy grows out of the publication of certain notices in what is termed the scavenger tax suit for Holt county. Plaintiff's first cause of action is based upon the allegation that defendant Cronin, who was county treasurer, notwithstanding the fact that the county board had designated the O'Neill Frontier, plaintiff's newspaper, as the newspaper in which "the delinquent tax list" should be published, delivered such list to the Holt County Independent, a rival newspaper. His second cause of action is based upon the allegation that defendant Cronin also delivered to the Holt County Independent the notice respecting the sale at public auction of the parcels of real estate, consisting of lands and lots, ordered sold by the decree entered by the district court after the publication of the delinquent tax list, upon which the first cause of action is grounded. It is admitted in the record that the only designation ever made by the county board was on April 21, 1905, prior to the publication of the delinquent tax list, in the following

language: "On motion, the printing of the scavenger delinquent tax list was awarded to the O'Neill Frontier." After the delinquent tax list had been published, improperly as we have held, in the Holt County Independent, the county board was fully advised, by the commencement of the action reported in 75 Neb. 738, of the fact that the defendant treasurer was proceeding upon the theory that the board had not designated the newspaper in which the notices in the scavenger suit should be published. With this knowledge, the board made no attempt at any further designation of a newspaper. The contention of plaintiff is that the designation made by the board on April 21 applied to and included all notices to be published at any stage of the proceedings in the scavenger suit. We think the district court did not err in holding adversely to plaintiff on this contention. The opinion by Mr. Commissioner ALBERT, in 75 Neb., pp. 741, 742, shows very clearly that there is a decided distinction between the two notices. In order to hold that the designation of April 21 of the Frontier as the paper in which should be published "the scavenger delinquent tax list" covered the notice of sale under a decree to be subsequently entered, we would have to read into the order made by the board language which it does not contain. In an action of this character, such a course would be unwarranted. Plaintiff's first assignment, therefore, must fail.

The second assignment is that the court erred in receiving in evidence, over plaintiff's objection, testimony of defendant Cronin to the effect that, before designating the Holt County Independent as the paper in which to publish the delinquent tax list, he consulted the county attorney, and was advised by him that he had a right to make such designation. As plaintiff recovered a substantial verdict and judgment upon his first cause of action, we are unable to see wherein this ruling of the court in any manner prejudiced him. It is therefore unnecessary to consider whether or not the ruling was erroneous. The same may be said of the third assignment, which is

that the court erred in admitting evidence that defendant Cronin had accounted to the county for all the docket fees and funds that he collected as county treasurer in the tax suit.

The fourth assignment is that the court erred in receiving in evidence testimony of the witness Elrod, on behalf of defendants, that he had examined the notice of the tax suit published in the Holt County Independent, and that it was "fatted" about one-half; and, fifth, that the court erred in giving instruction No. 6. These two assignments must stand or fall together. It appears from the evidence that the notice which the treasurer caused to be published in the Holt County Independent was prepared about the time or immediately after the order of the board of April 21, and that the notice was published in the Holt County Independent as prepared by the clerk. The contention of plaintiff is that, under his first cause of action, he was entitled to recover what his profits would have been in publishing that particular notice, while the contention of defendants is that plaintiff could not base an estimate of his profits on the notice published in the Independent, but that he was only entitled to profits on a notice properly prepared, and that in an action of this kind, where he is seeking to recover damages for the loss of profits which he would have made if he had been permitted to do something which he has not in fact done, defendants are entitled to have the damages minimized by excluding from the computation everything in the tax notice which was in the nature of surplusage, or, in other words, which might have been omitted without destroying the efficiency of the notice. The testimony objected to was along that line, and the language of the court in instruction No. 6 upon that point is: "But it would be the duty of the plaintiff, in order to make the damage as light as possible, to publish said notice in the least possible number of squares and at the same time have it perfectly legible. But the plaintiff would not be required to publish said notice in so small type or to make said notice

so short or so abbreviated as to make it misleading." We incline to the view taken by the trial court, but do not decide the point for the reason which we will give in considering the sixth and seventh assignments of error.

These assignments are that the verdict of the jury is contrary to the evidence, in that the verdict is much less than the amount plaintiff was entitled to recover under the undisputed evidence respecting the first cause of action, and the verdict is contrary to the instructions of the court, in that it is much less than the amount which should have been returned upon the evidence and under the instructions given. The action of defendant Cronin in depriving plaintiff of the right granted him by the county board was in every sense unwarranted. As said by Mr. Commissioner ALBERT, in his opinion in 75 Neb. 738, we are unable to view the conduct of defendant "in any other light than as a wanton disregard of duty and a reckless attempt to thwart the purpose of the governing body of the county." He perpetrated a wrong upon plaintiff for which he should answer, and for which the judgment in this case compels him to answer; but the fact that he did wrong does not justify permitting the plaintiff to mulct him in an unreasonable sum; that is to say, he should be compelled to respond in a sum which will give the plaintiff substantial justice. In such a case, where the recovery awarded is sufficient to probably do justice to the injured party, an appellate court should not interfere. We think it is clear that the notice published in the Holt County Independent was quite materially fattened. The fact, if it be a fact, which we do not say, that defendant had purposely fattened it so that his friend, the publisher of the Independent, could make a handsome profit out of the publication, would afford no justification for estimating plaintiff's damage upon that basis. To sum up our conclusion in a single sentence, we think that substantial justice has been done, and that this controversy should be brought to an end.

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The judgment of the district court is therefore

AFFIRMED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

LUCY A. WIGHT, APPELLEE, v. JENNIE A. MCGUIGAN ET AL., APPELLANTS.

FILED SEPTEMBER 26, 1913. No. 17,117.

1. **Tax Sale.** When real estate is sold for taxes, all delinquent taxes thereon must be included in the sale.
2. ———: **PRIVATE SALE.** Real estate cannot be sold for taxes at private sale unless all taxes thereon then delinquent have been included in the notice of public sale, and the land has been duly offered at such public sale and not sold for want of bidders.
3. ———: **INVALID SALE: INTEREST ACQUIRED.** A purchaser of land in good faith at private sale for taxes takes the interest of the public in the tax lien when the sale is invalid without fault of such purchaser.
4. **Waters: IRRIGATION DISTRICT: NONIRRIGABLE LAND: TAXATION.** The statute (laws 1895, ch. 70, sec. 49) provides that no land that for any natural cause is incapable of irrigation shall be held by any irrigation district or taxed for irrigation purposes. A tract of land, being a government subdivision or other well-defined tract, ought not to be included in an irrigation district if it is for natural causes incapable of irrigation, but the fact that there are comparatively small knolls or sloughs thereon will not necessarily exclude the tract, and under such circumstances the tract, if included, should be assessed as a whole.
5. ———: ———: **TAXATION: VALIDITY.** If the district board neglects to levy a tax for costs of organization and payment of outstanding bonds, the county board may levy such tax on the general assessment. The district board alone can equalize the assessment and levy a tax for the general purposes of the district. A tax levied by the county board for such general purposes of the district would be void. If a part of the levy is void a sale thereon would be voidable.

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6. **Taxation: INVALID SALE: INTEREST ACQUIRED.** A sale for taxes, although irregular and voidable, will operate to assign the lien of the public.
7. **Waters: IRRIGATION DISTRICT: TAXATION: PRESUMPTIONS.** Section 16, ch. 70, laws 1895, prescribes the form of assessment by the district assessor; when it appears that these provisions have been substantially complied with and the district board has reviewed the assessment and that a levy was made thereon, it will be presumed that the district board made such levy and that the proceedings were regular, in an action by the landowner to cancel the tax, unless the official records or other satisfactory evidence shows that the district board did not levy the tax.
8. ———: ———: ———: **VALIDITY.** From the evidence in this case it is found that the assessment and levy for certain specified years were sufficiently regular to create a lien for the tax so levied, and for other specified years there was no valid levy.

APPEAL from the district court for Custer county:
BRUNO O. HOSTETLER, JUDGE. *Reversed with directions.*

Sullivan & Squires, for appellants.

Silas A. Holcomb, Willis Cadwell, E. F. Myers and C. L. Gutterson, contra.

SEDGWICK, J.

Plaintiff brought this action in the district court for Custer county to foreclose the lien of a tax sale certificate. The sale was for general taxes and for taxes alleged to be levied by the Lillian Irrigation District. Defendants, the owners of the land, tendered the general taxes, and refused to pay the taxes for the irrigation district. The trial court found that plaintiff was entitled to a lien for the general taxes assessed against the land and for the principal part of the taxes assessed for the irrigation district, rejecting a few items of the latter. The defendants have appealed.

The answer filed by defendants is very voluminous; many of its allegations appear to be conclusions only; and it contains some generalities and repetitions. The abstract is incomplete and the record is very improperly

indexed. The public record introduced in evidence has been inaccurately made and carelessly preserved. We will necessarily be limited to a consideration of some of the leading principles of law that appear to be involved.

1. Objection was made to the introduction of evidence as to the assessment of property and levy of taxes in the alleged irrigation district because the existence of the district was denied and had not been proved. It has previously been declared by this court that an irrigation district properly organized under the statute is a public corporation. It is a political subdivision of the state, and is formed, not by an act of the legislature as counties and judicial districts are formed, but is more analogous in that regard to villages and school districts. The courts take judicial notice of the existence of municipal subdivisions of the state which are formed by legislative enactment, as by a special act of the legislature under the first constitution. *Hornberger v. State*, 47 Neb. 40. In *Agnew v. Pawnee City*, 79 Neb. 603, it is stated in the third paragraph of the syllabus: "The courts will take judicial notice of the fact that a city is an incorporated city, of the time when it was incorporated, and of the salient facts of its geography and history." That proposition is not discussed in the opinion, and so broad a statement was not necessary to a decision in that case. It was only necessary to hold that, when it is conceded that a city is incorporated, and a recorded plat of the city is in evidence upon which streets of the city are shown, the court will take judicial notice that the streets of cities so organized are public streets, and of the nature of the title and right of the city therein. Whether the courts in this state will take judicial notice of the existence of a village or an irrigation district, not created by public law, but by the county board of the county in which it is located, when the existence of such corporation is directly put in issue in an appropriate proceeding for that purpose, was not determined by the court in that case. In the case at bar, however, a copy of the history of the bonds issued by the

district was received in evidence with the consent of all parties; the defendants waiving all objection thereto, except that the facts therein recited were incompetent and immaterial. This document recited the facts in regard to the organization of the district, and there was no evidence offered modifying or explaining the facts therein recited. The trial court did not make any finding as to the existence of the district, nor was it asked to do so; all parties apparently assuming that the said recital of the facts of organization was correct. We think the defendants should be held to have waived this objection.

2. It is contended that the sale upon which the tax certificate in suit was issued was invalid because no private sale for taxes upon real estate can be made at the time that this sale was attempted. The statute then in force was the public revenue law of 1903 (laws 1903, ch. 73). By section 150 of the act real estate taxes became delinquent on the 1st day of May of the year after which the taxes have been assessed, and bear interest from that date at the rate of 10 per cent. per annum. By section 206 private sales may be made after the lands have been offered at public sale and the treasurer has made his return thereof to the county clerk. The public sale, by section 194, must be for "the amount of all delinquent taxes against each tract, with interest thereon to the date of sale," and the purchaser at a private sale must, of course, pay for each tract purchased all the delinquent taxes against the same. The sale was made on the 5th day of October, 1905, and was for the taxes assessed in 1903 and prior taxes. It did not include the taxes assessed in 1904, which became delinquent in May, 1905. It could not, of course, include the taxes assessed in 1904 because no public sale therefor could be made prior to the first Monday of November, 1905. No sale for taxes can be made without including all the delinquent taxes in the sale, and no taxes can be included in the private sale unless the land has been offered for those taxes at public sale. It follows necessarily that real estate cannot be sold

at private sale while there are delinquent taxes against the same for which the land has not been offered at public sale. The certificate is therefore invalid, but the purchaser is entitled to recover, as assignee of the public, the amount of the valid taxes, if any, included in the sale, and all prior and subsequent valid tax liens paid by her as such purchaser, with interest at 10 per cent. from the time of such purchase or payment.

3. The statute (laws 1895, ch. 70, sec. 49) provides that land not capable of irrigation shall not be retained in the district nor taxed. Defendants assume that any considerable piece of land, as a high, sandy ridge running through a tract, must be exempted from taxation, and the assessor seems to have so regarded it. The assessment roll for some years names seven forties (280 acres) as a tract of land to be assessed, and the tract is assessed as containing a much less number of acres. The men who made the assessment testify that these figures represent the estimated number of acres on which the water could be put. This is not the meaning of the decision in *Andrews v. Lillian Irrigation District*, 66 Neb. 461. If the tract is such as can be watered, the fact that there may be a knoll or slough thereon will not exempt the tract. It is for the board to determine in the first instance whether the tract is so capable as that irrigation would be beneficial to the tract considered in its entirety, and the decision of the board will not be reviewed unless it clearly appears that the tract is such as would not be benefited.

The owner of a specific tract of land ought not to be compelled to join an irrigation district and pay taxes for the support thereof if his land as a whole is so situated that for natural causes it cannot be irrigated. But such a farm cannot be said to be incapable of irrigation because there happens to be a knoll or ridge thereon, comparatively a small part of the farm, that cannot be watered. Such knolls and ridges should be taken into consideration in determining the benefits to the land as a whole by the irrigation works, and also in determining the value of

the land for assessment, and so will reduce the assessment. Such elevated knolls and ridges may be of such comparative importance as that the farm or tract as a whole should be found to be incapable of irrigation. If a government subdivision of land, or a tract otherwise capable of identification and definite description, is incapable of irrigation, and so situated with reference to the proposed district and other lands therein as to make such a course practicable, such tract might be omitted from the district, although it formed a part of a larger tract of the same owner. The idea of including a given farm or tract in the district and then omitting from assessment such knolls or sloughs thereon as the assessor may consider incapable of irrigation is impracticable and not contemplated by the statute.

4. The law requires the district assessor to assess the lands and return the assessment to the district board, and that board must correct the assessment and levy the tax. Unless these provisions were substantially complied with, there could be no valid tax, except for costs of organization and for payment of valid outstanding bonds. So far as this record shows, it should be found that in some years they were and in some they were not complied with. A sale for taxes, although irregular and voidable, would operate to transfer to the purchaser the lien of the public for the valid tax. To this lien must be added subsequent valid taxes paid by the purchaser, and this with interest at 10 per cent. would be the amount of plaintiff's claim.

5. The law provides that, if the district authorities fail to assess and levy, the county board shall levy on the county assessment for irrigation bonds and costs of organization. Plaintiff says these taxes can be sustained under that statute; but that seems impossible because the taxes are for said items and also to raise money to complete the work of the district, and the county could not levy for the latter purpose. If a part of the tax is void the sale would be voidable.

6. If defendants had tendered all taxes due they could

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not be charged with interest from the time of the tender; but it seems they did not tender all, because some of the irrigation taxes were a lien and plaintiff is entitled to interest as the county would have been if no sale had been made.

7. The plaintiff can recover in this action the amount of taxes legally assessed and included in her purchase of October 5, 1905, or in the amounts subsequently paid by her for taxes pursuant to that purchase, with interest thereon at 10 per cent. per annum from the time of paying such amounts, respectively. The general taxes are not controverted and were correctly stated by the trial court. To ascertain from this record the validity of the irrigation tax liens so paid is a difficult matter. Section 16 of the district irrigation law (laws 1895, ch. 70) prescribes the form of assessment by the district assessor. In the assessment of farm lands, not under lease and assessed to the owner, there must be included: (1) The name of the person to whom the property is assessed, if known. (2) A description of the land by township, range, section or fractional section, and, when such land is not a congressional division or subdivision, by metes or bounds or other description sufficient to identify it, giving an estimate of the number of acres, locality, and the improvements thereon. (4) Cash value of the real estate. (5) The cash value of the improvements on the real estate. (9) The full value of all property assessed. (10) The total value of all property after the equalization by the board of directors.

The assessments generally, and except as hereinafter stated, were duly certified by the district assessor, and were by the county clerk certified to the county treasurer for collection. In some cases the assessments also show the values found by the district assessor and the values as corrected by the district board of equalization. In such cases we think that, in the absence of satisfactory evidence to the contrary, it ought to be presumed that the board acted thereon at a regular meeting for that purpose, and upon notice, and corrected the assessment and duly levied

the tax, and that the assessment and levy were properly returned to the county clerk. It appears from the assessment rolls that the assessment for 1902 described these lands by government subdivisions of 40-acre tracts, stated the name of the owner to whom the lands were assessed, the valuation placed thereon by the district assessor and the corrected valuation by the district board of equalization; the amount of the tax for the irrigation bonds and the amount of the general irrigation tax, respectively. The defects in this assessment insisted upon are that it described the whole of each of the seven forties as assessed, whereas a part of two of the forties was not included in the irrigation district, and the assessment does not state the value of the land and the improvements thereon separately. The assessment roll shows that the number of acres actually assessed was 154.45, and this was approximately the number of acres in these seven forties that were included in the irrigation district. Of course, no deed issued upon so indefinite a description could be valid. The trial court held that the defendants ought not to be allowed to relieve their land from the lien of a just tax without offering to do equity in the matter, and so determined that this tax was a lien upon the land in favor of the plaintiff. There was much evidence upon this and similar questions, and some records of the various offices tending to identify the lands assessed, and upon the whole record, so far as we are able to understand it, we conclude that the trial court was right in so doing.

The assessments for 1903 and for 1901 are substantially the same, and it was correctly held that the defendants should be required to redeem the same.

In the assessment for 1904 the name of the party to whom the land was assessed was not stated. There is a column in which the total value is stated, but no value is stated in the column for values corrected by the board of equalization. In columns headed "Wheat and Corn" there are values stated which it is contended indicate the tax assessed against the land, but there is no other evi-

dence relating to the tax assessed, except the fact that the figures in some degree correspond with some other assessments. An assessment by the district assessor should be filed with the secretary of the district board and examined and adjusted by that board, and the levy made by them and then certified by the secretary to the county clerk. As we have already said, where the assessment shows a valuation made by the district board, together with the amount of the levy, and there is no evidence to the contrary, we may presume that the law has been complied with in this respect in an action to redeem from the lien of a tax conceded to be just and equitable. Here there is no indication in the record that the supposed assessment was ever in the hands of the secretary of the board or that the board ever considered or saw the assessment. On the contrary, there is evidence tending to show that the district assessor transmitted his proposed assessment directly to the county clerk. We think that the pretended assessment and levy for 1904 are so totally irregular as to be invalid and constitute no lien upon the land.

The assessment for 1898 shows a description of the land by forties; it states that the number of acres assessed is 255.55; states the name of the owner to whom the land was assessed, the amount of the irrigation tax on each forty, and the total amount, and states the value of each forty. The column entitled "Value as corrected by the board of equalization" is not filled, and there is nothing to indicate that the board of equalization ever acted upon this assessment. The same objection obtains to the assessment for 1899.

The assessment for 1905 is the same as for 1902, except that the amount of the bond levy is stated, but not the general levy for irrigation.

1907 describes the land, the name of the party to whom it was assessed, states the total number of acres to be 154.40 acres, states the amount of the bond levy, and the total value of the land. It does not show by whom it was valued, presumably by the district assessor. For 1900 the

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name of the owner and description of the land are stated; the total number of acres is stated to be 254.45. The amount of the irrigation tax is stated, and the total value, but the column for correction by the board of equalization is blank. There is nothing in the record, so far as we have observed, to raise the presumption that the tax for either the year 1900 or 1907 was levied by the district board, or that the board ever corrected or saw the work of the district assessor. As no one but the district board has power to levy such a tax, these levies must be held invalid. The trial court correctly found that the assessment for the irrigation district for the years 1897 and 1906 were invalid.

The judgment of the district court is reversed and the cause remanded, with instructions to enter a decree for the amount of the general taxes and for the irrigation taxes assessed in the years 1901, 1902, 1903 and 1905, with interest on the several amounts at the rate of 10 per cent. per annum from the time of the respective payments thereof by the plaintiff, with costs of the district court. The costs of this court are taxed against the plaintiff.

REVERSED.

REESE, C. J., LETTON and FAWCETT, JJ., not sitting.

MARY M. BOHRER, APPELLANT, v. MANSELL DAVIS ET AL.,
APPELLEES.*

FILED SEPTEMBER 26, 1913. No. 17,222.

1. **Limitation of Actions: REMAINDERMAN.** The statute of limitations does not begin to run against a right of action until that right exists. The party who has the right of action has the full period of the statute in which to enforce it. The remainderman has no right of possession until the particular estate is terminated. He has no right of action which depends upon the right of possession until he is entitled to the possession.

* Rehearing allowed December 24, 1913.

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2. **Life Estates: CONVEYANCE OF ESTATE: FORFEITURE.** The conveyance of the life estate by the life tenant conveys all of the rights of the grantor, and the grantee holds the same estate held by the life tenant. The remainderman cannot declare and enforce a forfeiture of the life estate by reason of such conveyance, and his rights are not ordinarily affected thereby.
3. ———: ———: **REMAINDERMAN: ESTOPPEL.** If a remainderman consents to a sale of a part of the estate, and advises the life tenant to make such sale for the purpose of payment of an incumbrance upon the whole estate, and the sale of a part of the estate is made for full value accordingly, and the proceeds applied in payment of the incumbrance, and the purchaser takes immediate possession of the land with deed of general covenants of seizin and warranty, and holds it for more than 17 years, making valuable improvements, the remainderman will not be allowed afterwards in an action in equity to repudiate such sale and recover his interest in the land as against such purchaser.

APPEAL from the district court for Greeley county:
JAMES R. HANNA, JUDGE. *Affirmed as modified.*

O. A. Abbott and George W. Scott, for appellant.

R. L. Staple, J. R. Berry and J. R. Swain, contra.

SEDGWICK, J.

The plaintiff brought this action in the district court for Greeley county to quiet her title in 80 acres of land in that county. Both parties derived title from Ansel A. Davis, who died in Greeley county on the 3d day of March, 1892, intestate and leaving no children, father or mother. At the time of his death he had 160 acres of land. His widow made application to the county court under the statute known as the "Baker's Decedent Law," and the county court, pursuant to that application, caused the land to be appraised, and, it appearing to be worth but \$2,000, the court entered a decree assigning the same to the widow as her homestead in fee. There was a mortgage of \$1,000 upon the homestead, and some time after the decree of the county court the widow sold one 80 of this land to the plaintiff for \$1,000, and in December, 1902, executed to

the plaintiff a deed of general warranty for which the plaintiff paid the sum of \$1,000, and the mortgage was satisfied with the proceeds of this sale. The defendant Mary R. Davis is the wife of the defendant Mansell Davis, who is a brother of the decedent, Ansel A. Davis, and the other defendants are the children of a deceased brother of Ansel A. Davis. Anna Davis, the widow of Ansel A. Davis, died in February, 1906, and in 1910 this action was begun by this plaintiff. The trial resulted in findings and decree in favor of the defendants, and the plaintiff has appealed.

The so-called Baker's decedent act has been many times held by this court to be unconstitutional and void, and it is conceded that the order of the county court attempting to vest the fee in the widow was void. She had only a life estate by virtue of her homestead right, but the plaintiff insists that, having paid the full value of the land, and having taken a warranty deed purporting to convey the entire estate and possession thereunder, and having held the same as her own to the exclusion of all parties and with the knowledge of all these defendants for more than 17 years when this action was begun, her title has become complete. The defendants insist that the statute of limitations did not begin to run as against them until the death of the widow holding the life estate, and, as their action was begun within the ten years thereafter, it was not barred by the statute.

Counsel for plaintiff, in the oral argument and in the brief, has presented his views with clearness and force, so much so that, if the question were a new one, the writer would have been convinced that the better reason supports the plaintiff's views. When the plaintiff bought this land, the so-called Baker's decedent act was generally supposed to be valid legislation, and all parties interested in the transaction supposed that the plaintiff's grantor had perfect title and that the plaintiff took a clear and unquestionable title by her purchase. She paid full value for the land, received a deed with full covenants of seizin and warranty, took immediate, complete and notorious pos-

session under her deed, and has held such possession continuously until the present time. She acted in entire good faith and ought to be protected, unless the defendants have a better right in law and at least an equal equity to be protected in that right. But the law is so well settled, not only by the decisions of this court, but by substantially all other courts where the English language is used, that we have no alternative but to enforce the law as it is, and, if there can and should be a better rule, leave the legislature to supply it.

The universal rule of law is that the statute of limitations does not begin to run against a right of action until that right exists. The party who has the right of action has the full period of the statute in which to enforce it. The remainderman has no right of possession until the particular estate is terminated. He has no right of action which depends upon the right of possession until he is entitled to the possession. The plaintiff says that the statute begins to run when there is an ouster or disseizin, and that a deed by a tenant to a stranger, purporting to convey the whole estate for full value actually paid and possession thereunder, operates as ouster of the remainderman. There are many authorities so holding, but never unless the remainderman by such sale and conveyance becomes entitled to possession. In the cases so holding, it is also held that the tenant by such sale and conveyance forfeits his estate; and the remainderman may at once elect whether he will consider the particular estate forfeited. If he so elects he may recover possession, and of course under such circumstances the statute of limitations would at once begin to run against his claim. But the courts so holding also generally hold that the remainderman is not required to consider the particular estate forfeited; he may disregard the act of the tenant in making such sale and conveyance and may claim his estate when the particular estate is terminated according to its terms. The statute then will not commence to run until his right of possession accrues at the termination of the life estate.

The sale and conveyance by the tenant is not an ouster or disseizin, unless the remainderman elects to so consider it. The general rule is that a conveyance of the life estate conveys all the rights of the grantor. The grantee holds the estate during the life of the grantor; the remainderman cannot forfeit the life estate, and is not entitled to possession until that estate terminates, and is not ordinarily affected by the conveyance. This is undoubtedly the rule in this state. *Helming v. Forrester*, 87 Neb. 438; *McFarland v. Fluck*, 87 Neb. 452.

The general question is pretty fully discussed in a note to *Allen v. De Groodt*, 14 Am. St. Rep. 626 (98 Mo. 159). The editor says in the note: "When, upon the termination of a life or other estate which entitled its owner to the possession of the property, the reversioner or remainderman becomes vested with an estate giving him a right to such possession, he will naturally meet with reluctance upon the part of the persons in possession to yield it to him. If possible, they will interpose a claim that his estate has been extinguished by prescription, or by his laches, or by any other mode which their ingenuity or that of their counsel can suggest. It is a general rule, well supported both by reason and authority, that no one can be in default in not bringing an action which it was impossible for him to have maintained if brought, and that no statute of limitations can commence running until the period arrives when the person claiming title or right of possession can successfully vindicate his claim and right by some appropriate action. When, therefore, one who has been a reversioner or remainderman becomes entitled to the possession of the property by the termination of a preceding estate in possession, and he brings his action to enforce his right, and is met with a plea of prescription or laches, the proper inquiry is, whether the action which he thus brings could have been commenced and maintained by him at any period anterior to its actual commencement; and, if so, the statute must be regarded as operating from and after such period. If, after that period, the full time

required by the statute of limitations has interposed, he should be regarded as barred. Otherwise, his right must be regarded as still intact and irresistible, however long continued the delay has been. To this rule there appears to be an exception, arising in the cases in which the tenant in possession has been guilty of some act or default for which the reversioner or remainderman might have elected to terminate the estate in possession. In such cases, while the reversioner may so elect, and, upon such election, maintain an appropriate action to recover possession, he may also waive the forfeiture; and, if he does waive it, he is regarded as obtaining a new right of possession upon the death of the life tenant, or other termination of the particular estate; and the statute of limitations will not be allowed to commence its operation until the happening of the latter event (citing cases). * * * The possession of the tenant for life is never deemed adverse to the reversioner or remainderman (citing cases). The protection of the latter is not limited to a mere presumption that the possession is not adverse to him; it cannot by any possibility become adverse, for the reason that such possession is not an interference with his rights. The tenant cannot make his possession adverse, though he denies that any one has any estate in reversion or remainder, and proclaims that he is the owner of the fee. 'There is no one to sue, no matter how often or how openly and loudly such tenant may claim to be an absolute proprietor, for the person in reversion or remainder concedes the right of possession for life, and cannot therefore dispute it.' *Salmons' Adm'rs v. Davis*, 29 Mo. 176. Hence it follows that the statute of limitations does not run against any possessory action in favor of a reversioner or remainderman until the extinguishment of the estate of the tenant for life. * * * The fact that the reversioner did not pursue his remedy to remove a cloud from his title appears to us to be immaterial. It has always been the law that any one might resort to a court of equity to remove an apparent cloud upon his title, and statutes are now in

force in many of the states under the provisions of which one may call upon any one asserting an adverse claim to his property to litigate such claim, and to submit it to judicial determination. If persons holding estates in remainder or reversion, and therefore not entitled to the immediate possession of the property, must exercise the right thus conceded to them in equity or by these statutes, or be met with a presumption that every conflicting claim accompanied by the possession is valid, these rights of action operate as so many snares. These equitable remedies, by which one claiming an estate or interest in land may appeal to the courts to determine it, were designed for his protection, rather than his destruction, and the fact that he does not resort to them ought not to be regarded as an irrevocable abandonment of those remedies to which he is otherwise entitled." We quote thus liberally from this note because the author here states the law as it now exists in this state and the reason for its existence. If the reasons given are insufficient and the law should be changed, the courts cannot change it without the help of the legislature.

Tenants in common have an equal right of possession, and if one of them conveys the whole estate for full value to a third party, who excludes the other tenant in common, the statute of limitations will run from the time of such exclusion. *Beall v. McMenemy*, 63 Neb. 70. The reason is because the right exists at the time of the exclusion. No new or additional right accrues to the tenant so excluded. His right of action is as complete as it ever can be. The plaintiff cites, as supporting her theory, *Lewis v. Barnhardt*, 43 Fed. 854; *Crawford v. Meis*, 123 Ia. 610. There is language in the opinion in each of these cases which appears to support the plaintiff's contention. In *Lewis v. Barnhardt* the estate was sold for taxes and the defendant claimed under that title. It was held that the purchaser at the tax sale was a purchaser in good faith, "without notice that his vendor owned an estate for life," and that in such case the statute of limitations began to run from the time of the purchase. The decision is put

upon that ground. The case is a peculiar one, and whether it may be considered as authority in general it is not applicable to the question here presented. *Crawford v. Meis* also involves the question of a tax title and the power of one cotenant to disseize the other. The court, after saying that "as a general rule the limitation statute does not begin to run as against a remainderman until the termination of the preceding estate," said that that rule involves the continuation of the relation of tenant and remainderman. The court then states the law as this plaintiff contends it is, but the decision of the case does not appear to be necessarily based upon this statement of the law. The court appears to consider that this view of the law is necessarily derived from its former holding in *Murray v. Quigley*, 119 Ia. 6, but that case involved a question of ouster between cotenants, and was principally determined upon the fact that the plaintiff's title was derived directly from the state, and the essential defense was that the conveyance was obtained by fraud. The language used in the latter case was apparently not justified by the former decision. Both of the cases, however, were decided after the note from which we have quoted so liberally was written, in which it was said: "The rule that the possession of a tenant for life is not adverse to the remainderman or reversioner has never been repudiated in express terms." The title of these defendants was not barred by the statute of limitations, and the district court was right in so holding.

The defendant Mansell Davis, as one of the two surviving brothers of the decedent, Ansel A. Davis, inherited a one-half interest in the estate in remainder, and has since purchased a one-twelfth interest from one of the heirs of his deceased brother, Orsel. The outstanding mortgage of \$1,000 covered not only the 80 acres of land involved in this litigation, but included also land which has now descended to Mansell Davis. It was in his interest to have this mortgage paid. He was consulted in regard to selling a part of the land in order to relieve the remainder from

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incumbrance, and consented to so doing. The proceeds of the 80 sold were used to relieve the remaining 80 from incumbrance. He participated in the transaction, which was for his benefit in the same sense in which it was for the benefit of the owner of the life estate, and has thus himself received the full value of all interest that he had in the land sold, and it seems clear that he cannot now in a court of equity repudiate the transaction and recover an interest in the land disposed of, while retaining the full value received therefor. The evidence does not show that the other defendants took any part in these transactions.

The decree of the district court, therefore, is right as to the children and heirs of Orsel Davis, deceased. The decree is modified so as to quiet the plaintiff's title in seventwelfths interest in the land, and in other respects is affirmed, and the cause is remanded, with instructions to partition the land between the plaintiff and the children of Orsel Davis, deceased. The costs in this court will be equally divided between the plaintiff and the defendant Mansell Davis.

AFFIRMED AS MODIFIED.

LETTON, J., not sitting.

FAWCETT, J., dissenting.

The majority opinion is an excellent one down to the last paragraph, and as to the first and second paragraphs of the syllabus. The closing paragraph of the opinion and the third paragraph of the syllabus are, in my judgment, all wrong. Referring to defendant Mansell Davis, the opinion states: "The outstanding mortgage of \$1,000 covered not only the 80 acres of land involved in this litigation, but included also land which has now descended to Mansell Davis. It was in his interest to have this mortgage paid. He was consulted in regard to selling a part of the land in order to relieve the remainder from incumbrance, and consented to so doing. The proceeds of the 80 sold were used to relieve the remaining 80 from incum-

brance. He participated in the transaction, which was for his benefit in the same sense in which it was for the benefit of the owner of the life estate, and has thus himself received the full value of all interest that he had in the land sold, and it seems clear that he cannot now in a court of equity repudiate the transaction and recover an interest in the land disposed of, while retaining the full value received therefor." This is an incorrect and very misleading statement of the record. He did not "participate in the transaction," nor was he "consulted" in regard to selling a part of the land "in order to relieve the remainder from incumbrance," nor did he "consent to so doing." His language will have to be greatly enlarged upon in order to give it any such meaning. I will now give the entire testimony upon that point. Before doing so, however, let me call attention to one legal principle and to one question of undisputed fact. The legal principle is: Estoppel is an intentional relinquishment of a known right. The undisputed fact is: That at the time Mansell Davis was "consulted," in reference to the sale of the 80, and "consented" thereto, everybody supposed that the whole quarter section was the absolute property of the widow Davis. It had been set off to her under the Baker's decedent act, which at that time had not been held invalid. The widow, who was making the sale, Mrs. Bohrer, who was making the purchase, her husband, Mr. Bohrer, Mansell Davis, the county judge and the lawyer in the case, all thought that the property belonged absolutely to her and that she had the full right to sell it, so that everything that Mansell said in relation to the matter was with that understanding as to the situation and ownership of the property. Now, let us see what the testimony is upon that point. I give it entire as shown by the abstract prepared by appellant.

Mrs. Bohrer, the plaintiff, gave no testimony on the subject. It is evident, therefore, that she had no conversation whatever with Mansell Davis. Her husband testified as follows: Direct examination: "Had a talk with Man-

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sell Davis about buying a part of it. Well, I met him in the road, and I told him I had been talking to Tom (that was her son) and old Annie herself (we always called her old Annie) about buying that piece of land, 'Well,' he says, 'if you buy it, it would help her out on that mortgage on that 80.'" Cross-examination: "Yes, sir; that talk with Mansell Davis was in November before the deed was made, along between his place and the land, in the road, stopped and talked about it. No one present just me and him. He was horseback. If I recollect I was afoot. Oh, we got to talking there like neighbors will, and then I told him I had been talking with Tom and Annie about that piece of land, and that's the way it commenced. Well, he was willing (this, of course, is a conclusion), said it would help her out, leave her a home if she got the mortgage off, and so on." The papers show how much the mortgage was. Redirect examination: "There was something said in my talk with Mansell Davis about how the rest of this mortgage would be taken care of. Why the mortgage would be released on the east 80 and put on the west 80, and that would leave her a home. That was the general understanding with us, all the way through." It will be observed that this redirect is a mere conclusion of the witness as to what was said. Recross-examination: "Q. When did Mansell make that statement to you? A. Why, as a friend, we was a-talking there. Then there was another time we were talking about that, that has come to my mind, Mansell Davis came down to my place one Sunday morning, and we talked the matter over again there west of the house. That was just before the deed was made. No one present, just him and me by ourselves. No; nothing said about the mortgage at that time that I recollect of; oh, yes; the mortgage was talked about at the first conversation. There were several talks around amongst us, I can't just remember. Talks with Mrs. Davis and Tom and Mr. Davis told me about the \$1,500 mortgage. Mrs. Davis, Tom and Mansell. Yes, sir; Mansell just said this, if I would take it she could turn the money

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over to the Lombard Loan Company, the one that held the mortgage against it, and could put the mortgage on the other 80, west 80, and that would release the east 80. No; it was Mansell, not Mrs. Davis, that said that. He knew the Lombard Company had the mortgage all right." This is the sum total of the testimony offered by plaintiff upon that point. Without any contradiction or qualification on the part of defendant Mansell Davis, I insist that it is entirely insufficient to sustain a judgment of estoppel as against Mansell. He did not know that he had any right in the property. The talk between him and Bohrer was, as twice stated by Bohrer, a mere friendly talk. There was absolutely nothing said about Mansell's having any interest. It was simply a friendly talk as to whether or not it would be a good thing for the Bohrers to buy the 80, and Mansell, as a friend, simply stated that if they did buy the 80 "it would help her out" on the mortgage.

Mansell Davis testified, upon direct examination: "I heard part of Mr. Bohrer's testimony, not sure I heard it all. I don't think I had as much conversation as he said. I remember his asking me something about the advisability of his buying that place. I can't just recall now nearly so much as he said here. I remember his asking me if I thought he ought to buy, or if it would be safe for him to buy it. Well, I may have suggested that it would be safe enough for him to buy it so far as I knew. I didn't advise him to buy it, as he said. I am very sure we never had any such conversation on Sunday at his place." Plaintiff's counsel did not see fit to cross-examine Mansell. The above is the entire testimony upon this point.

The decree of the district court found that the defendants were entitled to the possession of the premises at the death of Mrs. Davis and to the rents and profits since that time; that plaintiff's possession since the death of the life tenant had been wrongful; found the value of the improvements made by plaintiff to be \$125 (plaintiff testified that no buildings had ever been erected on the property); found the sums paid for taxes for the year 1892 and taxes

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since the death of the life tenant; found that plaintiff had paid the \$1,000 mortgage, and that such payment was beneficial to the defendants; found the annual rental of the property since the death of the life tenant to be \$100; stated the account between the parties as to rents, payment of taxes, and payment of mortgage, and found a balance due the plaintiff for \$1,047.47; that plaintiff was entitled to a lien for the same; ordered defendants to pay the same within 60 days, and that in case of a default the premises be sold to satisfy the amount so found due, with interest, costs and increased costs. This judgment is not only right in every respect, but is the only judgment which, under the former decisions of this court and the other authorities cited in the majority opinion, could, properly, be rendered upon the record before us. The district court evidently had those cases before it, together with *Hobson v. Huxtable*, 79 Neb. 340. The rules announced in those cases were followed, and the judgment should not be disturbed.

Briefly stated, plaintiff purchased the life estate of the widow Davis and has enjoyed that life estate for 17 years. In order to have that enjoyment, she paid off a mortgage of \$1,000. The decree of the district court now gives that back to her, credits her for taxes paid since the death of the life tenant, credits her with her improvements, and only charges her with rent since the life tenant's decease. If she is not obtaining full equity under the decree of the district court, then I confess that I have no conception of equity. The holding of the majority opinion amounts to absolutely taking away from a remainderman his estate, under the guise of estoppel, when no estoppel has been shown.

As an abstract proposition of law the third paragraph of the syllabus may be sound; but the trouble is, it has no application to the facts in this case. Mansell Davis is not invoking the aid of a court of equity to repudiate a sale by the life tenant which he had advised. He is here standing upon his legal rights, in a suit in equity com-

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menced by the grantee of the life tenant, which seeks to enlarge his purchase of his grantor's life estate into a purchase of the fee of the entire estate. In such a case the rule announced in paragraphs 1 and 2 of the syllabus applies. Mansell is not refusing to do equity. On the contrary, the decree of the district court requires him to do that which is equitable. Very few persons who buy a mere life estate have the good fortune to enjoy that estate for 17 years. The district court allowed plaintiff everything that she is entitled to, and its judgment should be affirmed generally.

HAMER, J., joins in above dissenting opinion.

HANNAH BRYANT, APPELLEE, v. MODERN WOODMEN OF AMERICA, APPELLANT.

MODERN WOODMEN OF AMERICA, APPELLANT, v. HANNAH STREIT (NEE BRYANT), APPELLEE.

FILED SEPTEMBER 26, 1913. Nos. 17,231, 17,988.

1. **Pleading:** INCONSISTENT ALLEGATIONS. If a pleader makes inconsistent allegations in a pleading, he is bound by those that are most favorable to the case of his opponent.
2. **Appeal:** BRIEFS. In a civil case, when no brief is filed which separately states and numbers the points relied upon, with the citations of authorities relied upon under each point, respectively, and designating "the several pages of the record containing matter bearing upon the questions discussed in such brief," and in other respects complying with rule 9 of this court, the court will not ordinarily, for the purpose of reversing a decision of the trial court, look for matters in the record not briefed as the rule requires.

APPEAL from the district court for Madison county:
ANSON A. WEICH, JUDGE. *Affirmed.*

B. D. Smith, W. E. Reed and T. S. Allen, for appellant.

William V. Allen and William Dowling, contra.

SEDGWICK, J.

This defendant, formerly Hannah Bryant, brought her action in that name in the district court for Madison county against this plaintiff upon a certificate of membership and fraternal insurance, upon the life of her former husband, Ellard E. Bryant. She recovered a judgment in that action, which upon appeal to this court was reversed and the causes remanded for another trial. *Bryant v. Modern Woodmen of America*, 86 Neb. 372. Upon another trial in the district court she again recovered a judgment from which the defendant in that action appealed to this court. Afterwards, the company brought this action in the district court for Madison county to obtain a new trial of the former action under section 602 of the code. The district court found against the company and entered a decree dismissing the action for a new trial. From this decree the company appealed to this court, and upon motion the two cases were consolidated and were submitted together.

In the brief of the appellant it is said: "We have assumed that the only issue here is whether or not the appellant is entitled to a new trial. * * * For that reason we have not discussed the evidence in the original case." The brief then states in a general way some reasons for supposing that the judgment in the original case is erroneous. These reasons are derived entirely from the supposed evidence in the case, and no reference is made in the brief to any part of the record supposed to disclose errors requiring a reversal. In this condition of these records, and the submission of the cases, there is no question presented to this court, except the sufficiency of the evidence to support the decree of the district court in refusing the new trial.

The ground relied upon for a new trial is that through the neglect of the official reporter of the district court, and without any fault on the part of the defendant company in the original case, the company was unable to obtain a transcript of the evidence in the original case and procure a settlement of a bill of exceptions. It appears that when the transcript of the evidence was delivered by the official reporter to the attorneys for the company, some 10 or 20 days before the expiration of the time for serving the bill of exceptions, the application for membership and the certificate of membership which had been offered in evidence at the trial were not incorporated in the transcript, nor attached thereto, and it is insisted that counsel were unable to obtain these documents in time to settle the bill of exceptions, and for that reason no bill of exceptions was ever properly settled and allowed.

Upon examination of the pleadings in the original case, we find that the petition sets forth in full the application for membership and the certificate of membership. The amended answer admits that these are the application and certificate in the following words: "The defendant admits that on or about the 16th day of January, 1907, one Ellard E. Bryant, mentioned in plaintiff's petition, then a resident of Madison, Nebraska, made and executed an application for membership in the defendant society, and to Box Elder Camp No. 485, a subordinate lodge of this defendant, located at said Madison, Nebraska (a copy of which said application is referred to in plaintiff's petition as 'Exhibit A' and incorporated therein and made a part thereof), and that in pursuance of said application this defendant did on the 28th day of January, 1907, issue to the said Ellard E. Bryant benefit certificate No. 1,346,629, a copy of which said certificate is set forth in plaintiff's petition."

The company now insists that the application and certificate are not correctly and fully set out in the petition in the original case; and that therefore it was necessary to introduce them in evidence, which was done, and that

if they were properly preserved and presented in a bill of exceptions they would show important representations of the insured which were false and vitiated the insurance.

If a pleader makes inconsistent allegations in a pleading, he is bound by those that are most favorable to the case of his opponent. When a contract is incorporated in the petition in a case and is admitted by the answer to be the contract between the parties, neither party will be allowed to prove or contend that the contract was other or different than as so solemnly agreed upon in the issues. No attempt was made to withdraw the admission or to change the answer in that regard. The application and certificate, then, were wholly unnecessary as proof of the contract between the parties, which was fully established by the pleadings themselves. It is not contended that these documents were material for any other purpose. These papers, then, would be of no assistance to the court if incorporated in the bill of exceptions. Moreover, these papers, being fully established by the pleadings, could have been supplied from the pleadings themselves if thought to be necessary in settling the bill of exceptions. The company, therefore, has suffered no "unavoidable casualty or misfortune preventing the party from prosecuting or defending."

The trial court was right in refusing a new trial; and, no error being shown in the original case, the judgment and decree in these cases are

AFFIRMED.

REESE, C. J., LETTON and FAWCETT, JJ., not sitting.

CHARLES P. BRESEE, APPELLANT, v. HARRY A. SNYDER,
APPELLEE.

FILED SEPTEMBER 26, 1913. No. 17,335.

1. **Bills and Notes: ACTION: PARTIES.** Under section 23 of the code, an action upon a promissory note may properly be brought against the maker thereof in the name by which he signed the note.
2. **Judgment: TRANSCRIPT: EXECUTION: SALE: COLLATERAL ATTACK.** A transcript of a judgment of the county court may be filed in the office of the clerk of the district court in any county of the state. It is not necessary to first file it in the county in which the judgment was rendered. When it appears that a true transcript of the judgment is filed in another county, execution and sale thereon will not be held void in a collateral attack eight or ten years afterwards; the land having been several times transferred to innocent purchasers in the meantime.
3. **Execution: SALE: IRREGULARITIES.** A mere irregularity in the notice of sale of real estate upon execution is cured by confirmation, as against a collateral attack.

APPEAL from the district court for Keya Paha county:
JAMES J. HARRINGTON, JUDGE. *Affirmed.*

Andrew M. Morrissey, Allen G. Fisher and William P. Rooney, for appellant.

Charles E. Lear, Forrest Lear and William H. Pitzer, contra.

SEDGWICK, J.

The plaintiff brought this action in the district court for Keya Paha county to set aside certain conveyances and quiet his alleged title in real estate situated in that county. Both parties derive their title by mesne conveyance from one Aaron Markley. Markley and his wife conveyed the land by warranty deed in 1893 to Folkert Fass. In April, 1896, Folkert Fass, in the name of F. Fass, and one H. H. Fass executed and delivered to one Gedney Venter their negotiable promissory note for \$300. In 1898 Ged-

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ney Venter obtained a judgment in the county court of Otoe county against F. Fass and H. H. Fass for \$311.92 and costs. Afterwards a transcript of this judgment, duly certified, was filed in the office of the clerk of the district court for Otoe county. Afterwards the clerk of the district court for Otoe county made a transcript of this judgment, and certified thereon that "the foregoing is a true and compared copy of the transcript in said cause as the same appears on file and of record in my office." This transcript was duly filed and docketed in the office of the clerk of the district court for Keya Paha county, and an execution issued thereon and delivered to the sheriff of Keya Paha county. That officer certified that he made diligent search in said county for goods and chattels of the defendants named therein, and for want thereof levied the execution on the land in question. The sheriff sold the land upon the execution to the plaintiff therein, Gedney Venter, on the 15th day of November, 1898. On the 11th day of May, 1908, Folkert Fass and Mary A. Fass, his wife, executed a quitclaim deed of the land in question to the plaintiff. The plaintiff claims under this deed, and alleges that the judgment and sale in the suit of Mr. Venter were so irregular as to convey no title. In 1899 Gedney Venter and his wife conveyed the land by warranty deed to M. L. Hayward, and in the same year Hayward and wife conveyed by warranty deed to W. C. Thomas, and in December, 1906, Thomas and wife conveyed by warranty deed to this defendant, Harry A. Snyder. Mr. Thomas took possession of the land under his purchase, and in the following year inclosed the land with a fence and used it as a pasture. There was no one living on the land when he bought it, and he continued to use it as a pasture until he conveyed it to this defendant, who appears to have bought it in good faith.

The appellant's brief does not comply with rule 9. It does not separately state and number the points of law, upon which he relied for a reversal, with the citations of authorities supporting each point cited under the point

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which they are supposed to support. The brief does not by number designate the several pages of the record (the abstract) containing matter bearing upon each question discussed, respectively. The references to adjudicated cases do not comply with the rule so as to enable the court to turn to them without loss of time. In other respects the rules are not complied with. Counsel must not be disappointed if the court refuses to do their work and brief their cases for them, especially for the purpose of reversing a judgment of the trial court. The judgment of the trial court is presumed to be right, and, if upon a general view of the record no substantial error prejudicial to the rights of appellant is observed, the court will not ordinarily look further for errors not properly briefed in compliance with the rules. The rules are not advisory merely; they are not binding upon the court alone; counsel must also observe them.

1. The objection that the judgment against Mr. Fass was invalid because he was not sued by his full name is without merit. An action upon a promissory note may properly be brought against the maker thereof in the name by which he signed the note, under section 23 of the code.

2. It is also objected that the district court for Keya Paha county had no jurisdiction to sell the land because the transcript of the judgment of the county court of Otoe county was not filed directly in Keya Paha county. It was first filed in the office of the clerk of the district court for Otoe county, and a transcript from that court filed in Keya Paha county.

Section 18, ch. 20, Comp. St. 1911, provides that a transcript of judgment in county court may "be filed in the office of the clerk of the district court in any county of this state." It is not necessary to file the transcript in the office of the clerk of the district court in the county in which the judgment is rendered, as in case of judgments of justices of the peace. The words of the statute are that "any person having a judgment * * * may cause a transcript thereof to be filed." There is no evi-

dence that the transcript was not correct and complete. Technical objections to the manner of its preparation and certification might be raised and determined upon motion to confirm the sale. We think that this objection ought to be disregarded when raised in this collateral manner in an equitable proceeding after the lapse of so many years; the land in the meantime being conveyed to innocent purchasers.

3. An irregularity in the notice of sale upon execution is mentioned in the brief. This might have been urged against the confirmation of sale, but ought not now to be considered in this collateral proceeding.

We have not found any error in the record requiring a reversal, and the decree of the district court is

AFFIRMED.

REESE, C. J., LETTON and FAWCETT, JJ., not sitting.

**FIRST NATIONAL BANK OF DAVID CITY, APPELLANT, v.
LEWIS SPELTS ET AL., APPELLEES.**

FILED SEPTEMBER 26, 1913. No. 17,350.

1. **Mortgages: DEED AS SECURITY: TITLE CONVEYED.** A deed of real estate given and received as security for debt will, as between the parties thereto, be treated as a mortgage. Such deed conveys the legal title, and the grantor's remaining interest in the land is equitable only. Such interest is not subject to the lien of a judgment, and can be reached by his creditors only by equitable proceedings.
2. **Vendor and Purchaser: BONA FIDE PURCHASER.** One who purchases the land in good faith for full value from the apparent owner and takes his deed from the holder of the legal title, without actual notice of any adverse claims, is not bound to take notice of a judgment against a former holder of the legal title, when such judgment was entered and docketed after such former holder of the legal title had conveyed the same to the grantor of such purchaser.

APPEAL from the district court for Garfield county:
JAMES N. PAUL, JUDGE. *Affirmed.*

C. M. Skiles, B. F. Good and L. B. Fuller, for appellant.

J. S. Pedler, contra.

SEDGWICK, J.

Lewis Spelts inherited an interest in real estate in Garfield county from his father, and conveyed the same by quitclaim deed to the Phillips County State Bank of Holyoke, Colorado, to secure his indebtedness to that bank. Afterwards the plaintiff obtained a judgment in district court for Butler county against the defendant Lewis Spelts, and caused a transcript thereof to be filed and docketed in the district court for Garfield county. The defendant Alvin Spelts negotiated with his brother Lewis and other brothers and sisters for their respective interests in the real estate. He knew that the interests of Lewis had been conveyed to secure an indebtedness, and their agreement was that Alvin should pay the agreed value of Lewis' interest to the bank and the bank should convey directly to Alvin. Pursuant to this agreement the bank executed a quitclaim deed to Alvin, and he paid the value of Lewis' interest in the land to the bank, which was applied upon the indebtedness to secure which Lewis had deeded his interest to the bank. Afterwards the plaintiff began this action in the district court for Garfield county to set aside the conveyance to Alvin and to subject the interest of Lewis to the lien of its judgment. The district court found generally for the defendants and dismissed plaintiff's action, and plaintiff has appealed.

The plaintiff in the brief seems to concede that Alvin paid full value of the interest of Lewis in the land, and bought it, as he did the respective interests of the other heirs, in good faith and without notice of the plaintiff's claim. The brief says: "In any view of the case, whether we consider Alvin Spelts a fraudulent vendee, or a pur-

chaser for value, the result is the same. * * * In either case he took the title to the undivided one-ninth interest of his brother Lewis, subject to the lien of the plaintiff which attached on the filing of a transcript of the judgment." In this the plaintiff is wrong.

An absolute deed, whether a warranty or a quitclaim deed, conveys the legal title. The grantor may still have some equities in the land. If the deed is given to secure an indebtedness, it is treated as a mortgage as between the parties to the deed, but it conveys the legal title. The grantor has no right in the land, except an equitable right to pay the debt and receive reconveyance. A judgment is not a lien upon an equitable interest in land. A levy and sale of an equitable interest will not pass the title to the purchaser. *Dworak v. More*, 25 Neb. 739.

The plaintiff obtained no lien upon the interest of Lewis by filing the transcript of the judgment. Lewis had no title, no leviable interest, merely an equitable right to conveyance upon satisfying his indebtedness to the bank. Such an interest is not subject to lien; it can only be reached by proceedings in equity. Alvin paid full value for the land in good faith and received his deed before the commencement of this action. His title, therefore, was complete before this action was begun.

The judgment of the district court is

AFFIRMED.

REESE, C. J., LETTON and FAWCETT, J.J.. not sitting.

LOUIS C. ANDERSON ET AL., APPELLANTS, v. JOSEPH A.
SCHERTZ ET AL., APPELLEES.

FILED SEPTEMBER 26, 1913. No. 17,302.

1. **Homestead.** As our statute uses the term "homestead," it means the house and parcel of land where the family reside and which is to them a home. *Galligher v. Smiley*, 28 Neb. 189; *Meisner v. Hill*, 92 Neb. 435.
2. ———: **CONVEYANCE.** Under section 4, ch. 36, Comp. St. 1905, any conveyance or incumbrance made of the homestead is absolutely void unless executed and acknowledged by both husband and wife. *Horbach v. Tyrrell*, 48 Neb. 514.
3. ———: ———: **VALIDITY.** A contract in writing to convey a homestead, which has been signed by both husband and wife, but which they have not acknowledged, is void, and will not be in any way enforced.
4. ———: ———: ———. The homestead means something more than and different from the \$2,000 exemption which the statute allows the homestead claimant as against the claims of creditors; it means the actual home of the family, including the land and buildings which constitute the same, and the possession and ownership of all which may be successfully defended by either husband or wife during the marriage state against the independent acts of either, and against the void acts of either, or both; and it is this homestead to which the survivor succeeds after the death of the husband or wife, and in which such survivor will hold the life estate. *Meisner v. Hill*, 92 Neb. 435.
5. **Specific Performance.** The court will not attempt to make a new contract for the parties litigant which they did not make themselves, nor will it enforce new conditions which could not have been within the minds of the contracting parties, nor will it enforce a contract which does not contain the substance of the agreement made.

APPEAL from the district court for Hamilton county:
(GEORGE F. CORCORAN, JUDGE. *Affirmed.*

J. H. Grosvenor, Wilcox & Halligan and J. G. Mothersead, for appellants.

Hainer, Craft & Aylsworth and Patterson & Patterson,
contra.

HAMER, J.

This action was brought to enforce the specific performance of a written contract for an exchange of lands. This contract covers certain lands in Deuel county, in this state, and 280 acres of land situate in Hamilton county, the property of the defendants, who are husband and wife. The district court refused to enforce specific performance of the contract, and rendered judgment dismissing the plaintiffs' action. From this judgment the plaintiffs have appealed.

We do not deem it necessary to consider all the reasons urged by the appellants for a reversal of the judgment, as, in our opinion, there exists a reason why the plaintiffs are not in any event entitled to the specific performance of the contract.

One hundred and sixty acres of land belonging to the defendants was occupied by them and is claimed by them as a homestead. The contract sought to be enforced was signed by both defendants, but it was *not acknowledged by either of them*. Section 4, ch. 36, Comp. St. 1905, reads: "The homestead of a married person can not be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife." In *Horbach v. Tyrrell*, 48 Neb. 514, the statute is quoted, and it is said: "The obvious purpose of this statute is to render all conveyances or incumbrances made of a homestead absolutely void unless such conveyances are not only signed and witnessed but acknowledged by both the husband and the wife." In the second point in the syllabus in that case it is said: "A conveyance of real estate, such real estate being the homestead of the grantors, is, unless acknowledged, absolutely void."

In *Blumer v. Albright*, 64 Neb. 249, the wife signed the instrument, but she stated to the justice of the peace who took the acknowledgment that the deed was not her voluntary act, and that she had been forced to sign it by

being threatened with the sheriff; but she finally told him that he could go ahead and take the acknowledgment, still persisting, however, that it was not her voluntary act. This court held that the wife's acknowledgment under the circumstances was not such an acknowledgment as was contemplated by the statute, and that "under the statutes of this state the conveyance of a homestead without the acknowledgment of the wife is absolutely void." In the syllabus it was said: "Under the laws of this state, the acknowledgment of the wife to a deed conveying the homestead is essential to its validity."

In *Buettgenbach v. Gerbig*, 2 Neb. (Unof.) 889, the statute in question was quoted, and it was said: "From the holdings of this court it would seem that we have firmly established the doctrine in this state that the statutory provisions for the conveyance or incumbrance of the homestead are exclusive. In other words, there is no power by which homesteads can be conveyed or incumbered other than by a substantial compliance with the statute, and this would mean only by an instrument in writing, executed and acknowledged by both husband and wife for that purpose. * * * A construction of a statute which results in nothing but annulments of its provisions cannot be upheld."

In *Whitlock v. Gosson*, 35 Neb. 829, the wife was confined in an insane asylum in another state, while the husband with his children resided on the homestead in Nebraska. Judge Post, speaking for this court, says: "The statutory provision for the conveyance or incumbrance of the homestead is exclusive." He then quotes the statute, and says: "Here is a plain prohibition against the incumbrance of the homestead without the joint act of both husband and wife. It contains no exception with respect to an absent or insane husband or wife. Had Mrs. Gosson, defendant's wife, been in fact a resident of this state and her domicile the premises in controversy, it is plain that she would have been incapable of relinquishing her homestead right, and a mortgage executed by her hus-

bánd would have been ineffectual for the purpose of creating a lien thereon. And it requires no argument to prove that on account of her absence from the state she could (not) accomplish by indirection that which she was incapable of doing by her voluntary act." In the same case the contention was made that the husband had represented himself in the mortgage to be a single man, and therefore that he was estopped from claiming his homestead right. Judge Post said: "Estoppel will not supply the want of power, or make valid an act prohibited by express provisions of law. The statute in effect declares a conveyance or incumbrance of the family homestead by the husband alone void, not only as to the wife, but also as to the husband himself. Therefore neither is estopped from asserting the homestead right as against the grantee or mortgagee. Such is the view sanctioned by the clear weight of authority and supported by the soundest reasoning." It has frequently been held that an instrument purporting to convey the homestead is absolutely void unless it is acknowledged.

It is contended by appellants that a conveyance is good as to all the interest of the defendants in their land, except as to the homestead of \$2,000 in value, and that they are entitled to a specific performance of the contract, except as to the homestead and compensation by abatement of \$2,000 in the amount of the purchase price. Foundation for this position can, perhaps, be found in some of the expressions of this court, which were recently reviewed and overruled in the case of *Meisner v. Hill*, 92 Neb. 435. In that case it was held that the limitation of the homestead to \$2,000 is solely for the purpose of fixing the rights of the homestead claimant as to creditors, and that this limitation did not apply as between the surviving widow and the heirs of the deceased.

In *Galligher v. Smiley*, 28 Neb. 189, Chief Justice REESE, delivering the opinion of this court, said: "In its inception a homestead is a parcel of land on which the family resides, and which is to them a home."

In *Palmer v. Sawyer*, 74 Neb. 108, the definition of Judge REESE was quoted with approval. In the syllabus in that case it is said: "A debtor who has acquired a homestead does not lose his right to the exemption, where he continues to occupy the property as a home, though, by reason of death and the removal of his family, he has no one living with him." In the body of the opinion it is said: "There is no provision in our statute for the termination of the homestead right when once acquired, except by death or voluntary action of the party acquiring it. The statute which provides for a homestead for the head of a family, who is unmarried when the homestead is selected, does not limit the right of its enjoyment to the time during which the premises are occupied by the dependent members of the family jointly with the owner." We think it follows from the authorities cited that the contract in question is void as to the entire homestead tract of 160 acres. The contract was not acknowledged, and the quarter section occupied as a homestead by the defendants cannot be taken from them under this contract, because it was not acknowledged, and because of the further reason that the land is exempt as a homestead.

Having determined that the contract cannot be enforced as to the homestead, should it be enforced as to the remainder? While contending that the homestead was limited to a tract of land of \$2,000 in value, appellants ask for enforcement of the contract as to the remainder, and compensation for the homestead. The evidence shows the land of defendants to be worth from \$125 to \$150 an acre, or the homestead is worth from \$20,000 to \$24,000, an amount greatly in excess of that part of the purchase price which the plaintiffs were to pay in money. The homestead embraces more than half of the land of the defendants involved in the controversy. Under these circumstances, to enforce the contract with the homestead out of it, is not to enforce the contract which the parties made, but it is to make a new contract for them, a con-

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tract which they never made or contemplated making. The contract enforced should be, in substance, the contract made. It would be a dangerous precedent to make and enforce a new contract between the parties to which they never gave their assent.

A careful reading of the evidence fails to satisfy us of the merit of plaintiffs' claim.

The judgment of the district court is right, and it is

AFFIRMED.

REESE, C. J., LETTON and FAWCETT, JJ., not sitting.

JOSEPH A. KIME, APPELLANT, V. NORBERT A. KRENEK ET AL., APPELLEES.

FILED OCTOBER 17, 1913. No. 17,201.

1. **Ejectment: EXCHANGE OF LANDS: ESTOPPEL.** Where plaintiff, the former owner of the land in question, exchanged it for other land of equal value, receiving and retaining title thereto, he cannot be heard to claim the title to the land so exchanged, where his claim is that he is the sole owner thereof in his own right.
2. ———: ———: ———. Where, prior to the exchange, plaintiff had deeded the land to a third party, who redeeded it to plaintiff's wife, but which deed was not recorded nor possession of the property taken by the wife, and the plaintiff exchanged it for another tract of equal value, receiving and retaining title and possession, he cannot, as the grantee or devisee of his now deceased wife, reclaim the possession and title to the property which he had caused the grantee of his deed to convey to the purchaser, who purchased in good faith and for full value, even though said grantee had reconveyed the property to the now deceased wife.

APPEAL from the district court for Box Butte county:
JAMES J. HARRINGTON, JUDGE. *Affirmed.*

William Mitchell, for appellant.

Eugene Burton and B. F. Gilman, contra.

REESE, C. J.

This is an action in ejectment whereby plaintiff seeks the possession of the northwest quarter of section 4, township 24, range 47, in Box Butte county. It appears from the pleadings and evidence that on the 29th day of February, 1896, the present plaintiff, Joseph A. Kime, then a married man, was the owner of the land in question, and that on that date he and his wife conveyed it to Loren Mallery, a relative, but whether for a consideration does not definitely appear. There is some evidence of a subsequent statement by plaintiff to the effect that the transfer was only colorable for the purpose of protecting it from the creditors of Kime. The deed was recorded March 3, 1896. On the 18th of the same month Mallery and wife conveyed the property to Susan Kime, the wife of the present plaintiff. This deed was not recorded until the 30th day of August, 1899. During this time the land was open and uncultivated prairie, and no one seems to have been in possession thereof. About the month of August, 1898, the present plaintiff applied to W. W. Norton for an exchange of lands. Norton owned an equal quantity of land which was inclosed in this plaintiff's pasture, and the land in question was adjacent to other lands held by Norton. The two tracts were of equal value. An agreement for an exchange was made, and Norton conveyed his land to this plaintiff, who has retained the ownership, and, so far as herein appears, is still the owner. At the time of the agreement for the exchange this plaintiff represented to Norton that the title was held by Mallery, but only for prudential reasons, and the deed to Norton would be made by him. A quitclaim deed of conveyance was executed by Mallery and wife to Norton, of date of September 30, 1898, and by him recorded on the 14th day of February, 1900. Susan Kime's deed not being of record, nor any appearance of possession of the land by her, Norton had no notice of any rights she might claim in the land, nor had he any knowledge of the existence of her

deed or any claim of title or interest in the land by her. The evidence shows that he acted in entire good faith in the transaction. Soon after he obtained the deed from the Mallerys he leased the land to Matthew G. Wambaugh, who continued in its occupation until February 12, 1900, when he purchased, receiving a deed of that date. This deed was recorded on the day of its execution. The land, by mesne conveyances, passed through a number of hands until the 12th of October, 1904, when the defendant became the owner by purchase, his deed of that date being recorded on the 28th of March, 1908. From the time of Wambaugh's lease the land has been in the exclusive possession of himself and grantees, the owners making valuable improvements and residing thereon, all conveyances from the Mallerys down to defendant having been made upon consideration and in good faith. On the 22d day of September, 1908, Susan Kime commenced this action. Thereafter she departed this life, and, upon a showing that she made a will and this plaintiff is the sole heir and devisee thereunder, the suit was revived in his name as the sole party plaintiff in interest. This proof was made by oral testimony of this plaintiff, but there is nothing in the record to show the contents of the will, nor if it was ever admitted to probate. The revivor having been entered, Joseph A. Kime became the sole plaintiff in his own behalf. A jury trial was had, which resulted in a verdict and judgment in favor of defendants. Plaintiff appeals.

From the four corners of the case we think there is a serious doubt if plaintiff was divested of the beneficial interest in the property by his deed to Mallery. His wife joined him in that deed. The Mallerys reconveyed the property to her, but she withheld her deed from record until long after the Mallerys conveyed to Norton for full value received and retained by plaintiff, and he (Norton) had, by his tenant, taken possession of the property. The land was being improved by the line of grantees from Mallery and Norton, the owners making their home thereon, but she appears to have given no notice of any

claim of ownership by her, presumably considering that the occupants were the rightful owners.

The former owners of the land under Mallery's deed to Norton, as well as to the defendant, were called as witnesses to testify to their purchase, the occupation and improvement of the property by them. Objections were made to their testimony on the ground that plaintiff was the representative of his deceased wife, he, as claimed, having obtained title from her. No witness was asked to detail any conversation or testify to any transaction with the decedent. We are unable to see how or where the provisions of our statute (code, sec. 329) were in any way violated, and can find no error in the rulings of the court upon the objections to the evidence.

It is true that the deed from the Mallerys to the now deceased wife of plaintiff was recorded before their deed to Norton was on record. But he had taken possession, by his tenant, before her deed was recorded, and that possession has been held ever since. It is provided by section 10816, Ann. St. 1911, that, as to subsequent purchasers in good faith without notice, a deed "shall take effect and be in force from and after the time of delivering the same to the register of deeds for record, and not before." Applying the rule of this statute to this case the condition would not be different had the deed to her been executed on the 30th day of August, 1899, the date of its record. At that time Wambaugh was in possession of the land as Norton's tenant, the possession being notice of his rights.

If it is true, as claimed by plaintiff, that his title was received from his wife by her will, he is in the attitude of insisting upon a recovery of the land, which he had exchanged to Norton for land of equal value, and at the same time retaining the full and ample consideration received for it. It is unnecessary for us to inquire what the rights of his deceased wife would have been had she survived to the end of this litigation. It is enough to know that plaintiff is now claiming the land in his own right

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and that he has received and retained its full value in exchange.

Some objections are made to the instructions given by the court to the jury, but they are without merit and need not be specifically noticed.

The verdict and judgment are just, and the judgment is

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

HIRAM P. WALKER, APPELLANT, v. JOHN HOKOM ET AL.,
APPELLEES.

FILED OCTOBER 17, 1913. No. 17,306.

1. **Principal and Agent: AUTHORITY OF AGENT: MORTGAGES.** The evidence examined, and it is found that J. O. W. was the duly authorized agent of plaintiff to loan money, receive payment thereof, and to reloan the same, under the direction of plaintiff, but that he had no authority, either express or implied, to bind plaintiff by the purchase and sale of the mortgaged property in his own name, without the knowledge, consent or ratification of plaintiff, and obligate plaintiff to release the security thereon.
2. **Mortgages: FORECLOSURE: AUTHORITY OF AGENT.** J. O. W. was the agent of plaintiff for the purpose of loaning money, with general authority to receive and reloan the proceeds upon security to be approved by plaintiff. Under such agency and authority he loaned C. \$800, taking a promissory note therefor, payable to plaintiff, secured by a mortgage on real estate. He subsequently purchased the real estate, paying the difference between the purchase price and the money secured by the mortgage, taking title in his own name, and undertaking to procure, cancel and return the mortgage and surrender the note secured thereby. He afterwards sold the property to defendant. Plaintiff, the owner of the note and mortgage, had no knowledge of what J. O. W. had done and never consented to nor ratified the transaction. The mortgage was of record in the mortgage records of the county and so continued, uncanceled and unsatisfied. *Held*, That in an action by plaintiff, the mortgagee, to foreclose the mortgage, he was entitled to a decree.

APPEAL from the district court for Clay county: LESLIE G. HURD, JUDGE. *Reversed with directions.*

Ambrose C. Epperson, for appellant.

Charles H. Sloan, Frank W. Sloan and J. J. Burke, contra.

REESE, C. J.

This is an action to foreclose a mortgage on the north half of lots 12 and 13, and the west 50 feet of the north 100 feet of lot 14, and the east 50 feet of the south 150 feet of lot 13, all in block 2, of Walker's First addition to the town of Ong, in Clay county, given by John Carlson, a former owner, and his wife to plaintiff on the 1st day of July, 1901, to secure their note for \$800. The petition is in the usual form, except that it is alleged that, subsequent to the execution of the mortgage, the mortgagors conveyed certain portions of the mortgaged property to others, who are made defendants, but no question is presented which requires further notice of them. The answer of defendant Hokom consists, first, of a general denial of all unadmitted averments of the petition; second, it is alleged that the loan to secure which the note and mortgage were given was negotiated through J. O. Walker, who was, on and prior to July 1, 1901, and for more than 7 years thereafter, the legally authorized agent of plaintiff to loan money, buy and sell commercial paper, indorse and assign notes and securities, both real and personal, for plaintiff, and to collect and receipt for all such, and that the note was taken by J. O. Walker for plaintiff under such contract of agency; that the said J. O. Walker thereafter received payment from the mortgagors and others of the full amount due on said note and mortgage; that at the time of receiving the same the said J. O. Walker had full right and authority to collect and receive the same and so bind plaintiff, his principal, and the payment was received on behalf of plaintiff; that by such pay-

ment the debt was paid and extinguished, the note and mortgage thereby canceled, the lien destroyed, and defendant entitled to a cancelation thereof of record, and the cause dismissed. The reply is a general denial. A trial was had, which resulted in a finding and decree by the court in favor of defendants, canceling the mortgage, and dismissing plaintiff's petition. Plaintiff appeals.

There is but one serious contention in the case. The evidence shows that J. O. Walker purchased the mortgaged property of the mortgagors for the sum of \$1,300; that he paid therefor by agreeing to cancel and return the note and mortgage and by paying in cash the sum of \$500, taking a deed to himself, and that he subsequently sold the major portion of the property to defendant Hokom for the expressed consideration of \$1,500. The note and mortgage were neither canceled nor returned to the mortgagors, nor had the plaintiff any notice or knowledge of the transaction between the mortgagors and Walker, nor of the sale and conveyance by him to defendant Hokom. It is conceded by plaintiff that J. O. Walker had full authority to collect and receipt for the payment of the principal and interest of the many loans which he had made in that vicinity for plaintiff, but it is insisted that J. O. Walker had no authority, either express or implied, to purchase the mortgaged property, taking title in his own name, paying the excess of the consideration, and agreeing to cancel and return the mortgage and note, but which he never did, and of which transaction plaintiff had neither knowledge nor notice until after the death of J. O. Walker, when he discovered the facts, but which he never ratified nor consented to by any action on his part. There is no averment of accord and satisfaction in the answer; the issue of payment being alone presented.

It is contended by plaintiff that the law is that an averment of payment in a case of this kind can be sustained only upon proof that the alleged payment was made in money or what usually passes and is treated in commerce as money, and that a transaction of the kind be-

tween J. O. Walker and the mortgagors can in no event be treated as payment. As there is no issue of estoppel by ratification or otherwise presented in the answer, we are impressed with the belief that plaintiff's contention is correct, but we do not decide the case upon that point.

The testimony of plaintiff was taken, and a large number of letters from him to J. O. Walker were introduced in evidence. It is made clear that J. O. Walker was the agent of plaintiff to loan money for the latter, and to receive the principal and interest, either remitting the money to plaintiff or reloaning it to other borrowers in the name of plaintiff (uncle of J. O. Walker) and upon securities to be approved by plaintiff, who is a nonresident of the state. We have examined the bill of exceptions closely, and are wholly unable to discover any evidence of other authority given to J. O. Walker, or of other transactions of a similar kind by him. The letters from plaintiff to J. O. Walker all tend strongly to show that proposed new loans were submitted to plaintiff, and he gave specific directions as to the making thereof. It is true that this was not always done, as J. O. Walker seemed to conduct a part of the business in his own way, at times taking the mortgages in his own name, and when payments were made entering the satisfaction of the mortgage, under the direction of plaintiff, but we are unable to find any evidence whatever that J. O. Walker's authority extended beyond this. The relations between the parties appear to be of the most confidential character, but the agency of J. O. Walker was at all times limited to his one line of employment. In the case now before us he clearly exceeded his authority, not only in the purchase of the land, but in making the purchase for himself, taking title in his own name, and selling it to defendant and retaining the proceeds of the sale, never at any time nor in any manner notifying plaintiff of what he had done. While it is true that he gave his promise to Carlson, the mortgagor, that he would procure and cancel the mortgage and return same with note to Carlson, yet he never

did either, the note at least, and probably the mortgage, remaining in plaintiff's possession. Carlson conveyed the mortgaged property to J. O. Walker, received the difference between the amount of the mortgage and purchase price, and accepted Walker's word to cancel and return the mortgage and surrender the note. The mortgage remained uncanceled and unsatisfied of record. We readily and fully appreciate that the foreclosure of the mortgage will result in a hardship upon the mortgagor and the defendant Hokom, the grantee of J. O. Walker, but in this we are met by the fact that the mortgage has been at all times, since its execution and recording, upon the mortgage records of the county, and that defendant Hokom had it within his power to protect himself by an examination of the records, of the contents of which he was charged with notice, before making the purchase of the mortgaged property. The familiar rule that the loss must fall upon the party whose want of care contributed thereto must be applied.

The decree of the district court is reversed and the cause remanded thereto, with directions to said court to enter a decree foreclosing the mortgage in accordance with the prayer of plaintiff's petition.

REVERSED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

WILLIAM J. JOHNSTON, APPELLEE, v. INDIANA & OHIO
LIVE STOCK INSURANCE COMPANY, APPELLANT.

FILED OCTOBER 17, 1913. No. 17,319.

1. **Insurance: APPLICATION: APPROVAL: LIABILITY.** Where a written application for insurance of live stock is made upon a blank form which provides that no liability shall attach until the application has been approved by the home office, and the application, together with the premium, is delivered to the agent of the company, and,

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before the application has been approved by the home office, the property insured dies, *held* that ordinarily the insurance company is not liable for loss occurring before such approval. Following *St. Paul Fire & Marine Ins. Co. v. Kelley*, 2 Neb. (Unof.) 720.

2. ———: CONTRACT: LAW GOVERNING. An insurance contract is governed by the law in force at the time of the making of the alleged insurance.

APPEAL from the district court for Frontier county:
ROBERT C. ORR, JUDGE. *Reversed.*

E. J. Clements and L. H. Cheney, for appellant.

Lambe & Butler and J. L. White, contra.

REESE, C. J.

This action was commenced in the county court of Frontier county upon an alleged contract of insurance from death by accident or disease of a horse of the value of \$500, the insurance being for the sum of \$300. It was alleged in the petition that the contract of insurance was entered into on the 26th day of June, 1909, to continue for one year from said date, at which time plaintiff paid the premium of \$30, and that defendant by its agent agreed that the insurance should be effective from that time; that on the 30th day of the same month the horse died from disease, without the fault of plaintiff; that the loss was duly reported to defendant on the 30th day of the same month, and for which judgment was demanded. Defendant answered, admitting the ownership of the property in plaintiff; that it was of the value of \$500; and that on the date named plaintiff applied to defendant's soliciting agent for insurance to the extent of \$300; alleging that the agent had no authority to enter into any contract of insurance, being only a soliciting agent, whose authority was limited to taking written applications, signed by the proposed assured, and which application was to be forwarded to the home office of defendant company at Crawfordsville, Indiana, when, if approved, a policy would be issued; that the application was signed by plaintiff and

forwarded to the office; that said application was forwarded by Weckbach, the soliciting agent, and received by the company on the 30th day of June, 1909, at the hour of 4 o'clock P. M. of said day; that between the hours of 8 and 9 o'clock of the morning of said day the horse died; that defendant issued said policy at between 4 and 5 o'clock of said day, and without any knowledge that the horse had died, said policy being for a term of one year from June 30, 1909; that, when defendant learned that the insured property had no existence at the time the policy was issued, it tendered back the \$30 to plaintiff, and has kept the tender good. Reply: (1) A general denial; (2) alleging that it was specifically understood between defendant's agent (Weckbach) and plaintiff that the insurance was to run for twelve months commencing at noon on the 26th day of June, 1909; that the policy was issued and forwarded to defendant's agent at Lincoln, Nebraska; that at the time the policy was issued the managing officers of defendant knew that the contract was that the insurance was to date from the 26th day of June, 1909; that by the acts of the officers and agents of the company they had estopped it from denying liability on the policy.

Defendant moved the court to strike out the averments of the reply for the reason, first, that no part of the same was contained in the reply filed in the county court, where the suit was instituted and first tried; second, that the same raised new and different issues; third, that no estoppel was pleaded in the county court; fourth, that the same, if material, should have been pleaded in the petition, and not in the reply. The motion was overruled and a trial had to a jury, who returned a verdict in favor of plaintiff for the full amount of the policy, and on which a judgment was rendered. The motion for a new trial was overruled, and defendant appeals.

It is shown by the evidence that the application for insurance was made on the 26th day of June; that the horse was taken sick on the 29th, and died in the forenoon of the 30th; and that the policy was written up during the after-

noon of the same day, dated June 30, to continue one year from that date, and returned to defendant's agent at Lincoln, soon thereafter, to be countersigned and delivered to plaintiff, but without any knowledge of the death of the horse. When the policy reached the agent in Lincoln, he, having learned of the death of the horse, did not countersign nor deliver the policy.

As we view the case, it is not necessary for us to pass upon the alleged error of the court in refusing to strike out the averment of estoppel in the reply, for the reason that, if defendant is liable at all, that liability rests upon other grounds, and, if not liable at all, the question of estoppel becomes an immaterial one.

It is stipulated in the application for insurance that the insurance "shall not be in force until accepted by the home office, and the policy issued thereon." But it is claimed by plaintiff that this clause furnishes no protection nor defense for the company in the face of the statute of this state. Upon this subject reliance is placed upon the provisions of section 49j, ch. 43, Comp. St. 1911. This section cannot be considered, for the reason that it was not in force at the time the alleged contract was made, whether that date should be held to be June 26, or June 30, 1909. It seems clear that the clause in the application, signed by plaintiff, which provides that the insurance shall not be in force until the application is accepted by the home office, and the policy issued thereon, is valid, unless procured by fraud, misrepresentation, mistake, or in violation of some statute or contract entered into between the parties, or their authorized agents. *St. Paul Fire & Marine Ins. Co. v. Kelley*, 2 Neb. (Unof.) 720, and cases there cited, approved and followed in *Lowe v. St. Paul Fire & Marine Ins. Co.*, 80 Neb. 499, which must be decisive of the question.

It is fundamental that, where a contract is made with reference to or covering property whereby one assumes a liability with reference to it, the property must be in existence, either actually or potentially, in order to form a

basis or consideration for the support of the agreement. In this case the question of whether a contract of insurance was made during the life of the horse becomes an important one. In other words, was such a contract made on the 26th day of June, at the time of making the application for the insurance and the payment of the premium, or did they only constitute a proposal or offer to enter into such a contract when approved by defendant at Crawfordsville? The application states that the insurance was not to be in force until approved and the policy issued. It also contained a recital that the insurance was not based upon "any statements or promises made by any solicitor or any person professing to represent the company, and that no agent or other person professing to represent the company has power or authority to make oral contracts of insurance, or to bind the company by any oral statements or representations, or to waive, alter or vary any of the agreements or conditions contained in this application, or the policy which may be issued thereon." There is no testimony in the record as to how or by whom the application was written or filled out, whether it was submitted or read to plaintiff, or if he was aware of its contents, except his answers when he signed it. There is no word as to knowledge, or the absence thereof, on the part of plaintiff of the conditions contained in the application, and his testimony is not clear as to the construction placed upon the application by the agent. His final testimony is that the agent stated that the insurance would date from that day if the application was accepted by the company. The deposition of the agent was taken, and although his attention was challenged to the subject of what he said to plaintiff "in regard to when, if ever, the insurance would take effect and be in force," his answer fails to respond to that part of the question, and this part of the case is not made clear. If the conditions contained in the application were brought to the knowledge of plaintiff when he signed such application and paid the premium, it is apparent that he is not entitled to recover.

The judgment of the district court is reversed and the cause is remanded thereto for further proceedings.

REVERSED.

ROSE, SEDGWICK and HAMEB, JJ., not sitting.

CONSERVATIVE LIFE INSURANCE COMPANY, APPELLEE, v.
JAMES A. BOYCE ET AL., APPELLANTS.

FILED OCTOBER 17, 1913. No. 17,331.

Fraudulent Conveyances: HUSBAND AND WIFE: EVIDENCE. The evidence, the substance of which is stated in the opinion, is examined, and held not to support the charge of fraud or conspiracy between husband and wife for the purpose of defrauding creditors of the husband.

APPEAL from the district court for Douglas county:
ABRAHAM L. SUTTON, JUDGE. *Reversed and dismissed.*

Hollister & Cunningham and C. W. Britt, for appellants.

Richard S. Horton and Gerald M. Drew, contra.

REESE, C. J.

This action is in the nature of a creditors' bill instituted in the district court for Douglas county by plaintiff against the above named defendants. It is alleged in the petition that the defendants Boyce are husband and wife, and that the banks named are banking corporations, duly organized, etc., in the city of Omaha; that on the 8th day of August, 1905, the plaintiff recovered a judgment in the county court of Douglas county against James A. Boyce and William F. Porter for the sum of \$789.15 principal, and the costs taxed therein at \$18; that the judgment was duly transcribed to the district court of that county, and execution issued thereon, the same being returned unsatisfied; that

the defendant James A. Boyce, with intent to defraud his creditors, and especially the plaintiff, and preventing it from collecting its judgment, has deposited in the First National Bank of Omaha the sum of \$1,500 in the name of his wife, Ethel K. Boyce, and has deposited in the Corn Exchange National Bank of Omaha in her name a sum of money, the amount of which is unknown to plaintiff; that the said Ethel K. Boyce has no interest in said funds or either of them; that the said James A. Boyce, for the purpose of defrauding plaintiff, and his creditors, has purchased certain real estate, and has placed the legal title to said property in the name of his wife, Ethel K. Boyce; that the said James A. Boyce and Ethel K. Boyce have conspired together for the purpose of defrauding their creditors, and, in pursuance of such intent, have placed in the name of defendant Ethel K. Boyce title to the following described real estate (from the confused condition of record, it will be impossible to state descriptions with precision): Lot 13, block 5; west 10 feet of the north $\frac{1}{2}$ of lot 15, block 2; north $\frac{1}{2}$ of lot 16, block 2; east 55 feet of the north 140 feet of lot 10, block 5; west 35 (75?) feet of the north 150 feet of lot 10, block 5; west 52 feet of the north 140 feet of lot 9, block 5; east 55 feet of the north 140 feet of lot 10, block 5 (this seems to be a repetition); east 80 feet of the north 150 feet of lot 11, block 5; all in Park Place addition to the city of Omaha, Douglas county, Nebraska; and the west 50 feet of the north $\frac{1}{2}$ of lot 7, block 2, Orchard Hill addition to the city of Omaha; that the said James A. Boyce paid for all of said property and is the owner thereof, and the title thereto has been placed in the name of Ethel K. Boyce for the purpose of defrauding plaintiff and other creditors; that the title was so placed in Ethel K. Boyce's name after the recovery of plaintiff's judgment, with the fraudulent intent above named. The prayer of the petition is that the money on deposit in the two banks be declared to be the money of James A. Boyce, and that the banks be enjoined from paying the same out upon the checks of Ethel K. Boyce. A decree is also asked

that all the real estate, above described, be declared to be the property of James A. Boyce; that Ethel K. Boyce has no interest, right or title therein; and that it may be ordered sold for the payment of plaintiff's judgment.

To this petition the defendant James A. Boyce made answer consisting (1) of a general denial; and (2) that plaintiff is not the real party in interest, it having sold and transferred the judgment to another, whose name is given; but, as we find no evidence upon this averment, it need not be further noticed. The separate answer of Ethel K. Boyce is to the same effect, but with the further averment that plaintiff has become extinct, its charter surrendered and canceled, and its business being since closed. No other pleadings are shown by the transcript.

The cause was tried to the court, which resulted in findings and decree to the effect that a judgment was recovered in favor of plaintiff and against James A. Boyce; that plaintiff filed its transcript and caused execution to be issued, the same being returned unsatisfied as alleged, and that the amount due was as alleged; that in September, 1903, and after the indebtedness upon which the judgment was obtained had accrued, James A. Boyce "gave to his wife, Ethel K. Boyce," the sum of \$1,000, and that the same was so given for the purpose of defrauding plaintiff and to prevent it from collecting its judgment, and the same was so received by the said Ethel K. Boyce; "that when the said defendant James A. Boyce gave said sum of money to his wife, Ethel K. Boyce, the said defendant James A. Boyce was unable to pay his debts and was indebted to this plaintiff and to others, and that this plaintiff was defrauded thereby and prevented from collecting its judgment, that the said gift is void and made in fraud of the rights of this plaintiff;" that defendants James A. Boyce and Ethel K. Boyce were copartners in the profits derived from certain transactions on the board of trade made by James A. Boyce with the funds of defendant Ethel K. Boyce; that said profits were invested by James A. Boyce and Ethel K. Boyce in the west 50 feet of the

north $\frac{1}{2}$ of lot 7, in block 2, Orchard Hill addition to the city of Omaha, the east 55 feet of the north 140 feet of lot 10, block 5, and the east 80 feet of the north 150 feet of lot 11, block 5, in Park Place addition to the city of Omaha, the title to which was taken in the name of Ethel K. Boyce, and the said James A. Boyce has an undivided interest therein, and which is subject to the payment of plaintiff's judgment, and the judgment is a lien upon said half interest. It is further found that the gift of \$1,000 given by James A. Boyce to his wife in September, 1903, was invested by her in the east 55 feet of the north 140 feet of lot 10, block 5, the west 75 feet of the north 150 feet of lot 10, block 5, the west 52 feet of the north 140 feet of lot 9, block 5, the east 80 feet of the north 150 feet of lot 11, block 5, and the north $\frac{1}{2}$ of lot 13, block 5, all in Park Place addition to the city of Omaha, and the title taken in her name, and that a trust in the sum of \$1,000 should be impressed upon said real estate in favor of plaintiff, and a lien thereon to the extent of the said sum of \$1,000; that all the other real and personal property of Ethel K. Boyce or in her name of record affected by this suit is not liable for the payment of said judgment, or any part thereof, and is not liable for the payment of any debt or obligation of the said James A. Boyce. The findings were in favor of the two banks. A decree was entered in accordance with the foregoing findings, and the sheriff was ordered to proceed to sell the one-half interest in what is declared to be the partnership property, and should that fail to sell for sufficient to pay plaintiff's judgment, with interest and costs, and the costs of this action, he may sell such portion of the real estate held liable as may be necessary to pay the remainder thereof, not to exceed the sum of \$1,000. The usual order for the sale of the property was entered. Defendants James A. Boyce and Ethel K. Boyce appeal.

We have read with care, not only the abstract and briefs in this case, but all the pleadings and evidence preserved in the transcript and bill of exceptions. The evidence gives

a full history of the course of business pursued by the defendants since their marriage in 1890, and in which it appears that at the time of their marriage Mrs. Boyce was possessed of about \$800 in money, which, by payments by her mother soon thereafter, amounted to about \$1,000, which she kept separate and apart from her husband's business, handling and investing it as she saw fit; that at the time of their marriage Mr. Boyce was the proprietor of a normal school at Princeton, Indiana, and she, in her own right, took charge of a dormitory or large rooming and boarding house, which she conducted for about four years, and during which time she ran a book, music and stationery store, and at the end of which time she had accumulated, in addition to her former means, the sum of about \$4,000, which she retained as her own, and out of which she loaned some \$2,000. At the end of this time Mr. Boyce disposed of his school, and they later went to Arkansas where, he was employed in charge of another school, where they remained some time; Mr. Boyce receiving a salary of \$2,500 a year for his services. During this time Mrs. Boyce's health was not good, and Mr. Boyce suffered an illness of typhoid fever, and they soon thereafter came to Nebraska, settling temporarily at Nebraska City, Mr. Boyce's health not being good, and he was earning little or nothing for a long time. They afterwards went to Kearney, where they resided for a time, and then came to Omaha, where they still reside. The long continued indisposition of Mr. Boyce and his inability to earn the means of a livelihood for the family made inroads on the capital of Mrs. Boyce, although this is not shown with particularity. He later earned money by promoting local enterprises in Auburn, Hastings and St. Paul, for which he received about \$3,000, and out of which he paid his wife \$1,500. After settling in Omaha he promoted what is called a "brick deal," his commission amounting to about \$3,800, and out of which he paid his wife \$1,000, making a total of \$2,500 paid to her. This subject was not as clearly explained as it should have been, but it clearly

appears that he had made use of a part of her money in advancing his business, and, in connection with her expenditures in the maintenance of the family expenses, it is apparent that he did not overpay what he justly owed her. Counsel treated these payments as "gifts," which they clearly were not. Mrs. Boyce had the absolute right to receive and he to return the money she had expended in his assistance and the maintenance of the family.

After they settled in Omaha Mrs. Boyce, desiring to engage in business on her own account, obtained a commission business, which, with her means, she maintained for some time, but which proved not to be profitable. In order to secure the use of a wire between her office and her correspondent in St. Louis, she deposited of her own funds the sum of \$5,000, which remained on deposit as long as she retained the use of the wire, upon relinquishing of which she drew down the deposit and commenced the purchase of real estate in the city. Out of her funds she repaid principally all persons who had made deposits with her. It would extend the opinion to an unnecessary length to give in detail all the items of business and expenses as contained in the bill of exceptions. It must be sufficient to say that the evidence clearly establishes the facts that she maintained the business, meeting expenses with her own checks, and allowing her husband 25 per cent. of the profits for his services in managing the business under her control, he being responsible for none of the losses. If no profits were made he received no compensation. She kept her funds deposited in the banks in her own name, and out of which she met expenses. There was no partnership relation existing between them. While in this service he occasionally made ventures on the board of trade, at one time buying a quantity of pork, and out of which he made a handsome profit. In doing so he took from his wife's funds, but without her knowledge or consent, the sum of \$100, which he almost immediately returned. He seems to have bet heavily on a pending election and made a gain of \$3,000. He purchased a \$5,000 automobile, which he

used for some time in the city and then sold. In none of these deals did his wife participate or have any interest. It is very clear that there is no evidence of the existence of a partnership between the two in any of the transactions described, and, hence, the findings of the court that such partnership existed, and that thereby the plaintiff was entitled to a half interest in the property, described in the findings to be sold by the sheriff, cannot be sustained.

Mrs. Boyce appears to be a practical and successful manager of her own affairs, although not always successful in her enterprises. Knowing the failings of her husband in financial matters, she has aimed to keep her individual property out of his hands as much as circumstances would permit. The husband is under both a legal and moral obligation to pay his debts to his wife as to any other creditor. It is apparent that he has refunded to her no more than he has used of her means. It was his duty so to do and it was her right to receive. We are unable to detect convincing proof of fraud in her dealings either with her husband or with others. The statute requires this court to decide the case as if the court of first instance, uninfluenced by the decision of the district court. We are unable to view the case as seen by the learned trial judge.

The decree of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

MELVIN V. HALLGREN, APPELLANT, v. JACOB L. BECKER,
APPELLEE.

FILED OCTOBER 17, 1913. No. 17,347.

1. **Equity: REFORMATION OF CONTRACT: INJUNCTION.** In an action in equity to enjoin a suit at law and to reform the written contract upon the provisions of which such suit depends, the basis of the equitable action is the right of the plaintiff to the reformation of the contract.
2. **Contract: REFORMATION: EVIDENCE.** "In order to authorize the reformation of a written contract, it must be made to appear what the actual contract between the parties was; that the written contract exhibited does not express the contract made; and these facts must be established by clear, convincing, and satisfactory evidence." *Slobodisky v. Phanix Ins. Co.*, 52 Neb. 395.

APPEAL from the district court for Dawson county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

Thomas F. Hamer, for appellant.

W. D. Oldham and *H. M. Sinclair*, *contra.*

REESE, C. J.

This is another one of those unfortunate lawsuits between relatives, the existence of which is always to be deplored. The relation between plaintiff and defendant is that of nephew and uncle. The pleadings are too long and verbose to be here copied or even summarized, and we shall be content by giving a brief statement of the facts out of which the litigation has grown. Defendant is the owner of a farm of 320 acres situated in Dawson county. In the fall of 1908 he, by an oral agreement, leased the land to plaintiff, who then resided a distance of about 40 miles therefrom, the term of lease to begin on the 1st day of March, 1909. There is a sharp conflict between the parties as to what the length of the term should be, plaintiff claiming that the final agreement was that he should have the use of the land for one year with the privilege of

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extending the term to five years if he so elected. Defendant insists that it was a definite agreement for one year, ending March 1, 1910. No written contract of lease was entered into until the 23d day of April, 1909, when the parties obtained the services of a scrivener, and a contract in writing was prepared and signed by them. This writing was defective in many particulars and limited the term to one year. Plaintiff had long before that time taken full possession of the farm, residing thereon with his family, and progressing with the farm work. The relation between the parties appears to have been cordial and confidential for some time, when disagreements arose. We deem it unnecessary to state the cause of the friction between them. Plaintiff continued to reside upon and cultivate the land, and on the 23d day of August, 1910, during the second year of plaintiff's possession, defendant served upon him a written notice as follows: "Sumner, Nebr., 8-23-1910. Notice to Quit. I hereby give you notice to quit and deliver up on the first day of March, 1911, the possession of the farm which you now hold of me as a tenant. Dated August 23, 1910. To Melvin V. Hallgren, Tenant. J. L. Becker, Landlord." At that time plaintiff had plowed some 40 acres of the land and sowed the same in wheat, and had also disked 10 acres in rye, which was then up and growing. On the 1st day of March, 1911, defendant served upon plaintiff a notice to quit the "E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section four (4), town (11), range nineteen (19), N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section three (3), in town eleven (11), range thirty-three (33), town twelve (12), range nineteen (19), also the field of alfalfa north of the Union Pacific Railroad track in section four (4), town eleven (11), range nineteen (19), in Dawson county, Nebraska." It may be observed that the farm and contract of lease includes the southeast quarter of section 33, township 12, range 19, but which is not included in the notice to quit. Proceedings in forcible detention were commenced before a justice of the peace, but the record of that suit is not before us, and we

have no way of knowing the description of the land involved therein. After an adjournment of eight days had been obtained, plaintiff brought this action for an injunction to restrain defendant from prosecuting the forcible detention suit and to reform the contract of lease. In the petition the land is described as in the written contract, the southeast quarter of section 33 being included. The answer and cross-petition also includes the land in section 33, and therefore we may assume that the suit in detention included the same, although not mentioned in the notice to quit. No point seems to have been made upon the trial by which the effect of the notices were drawn in question, and no further attention will be given to it. A temporary injunction was granted at the commencement of the suit. The cause was tried to the district court, the result thereof being a finding in favor of defendant, the dissolution of the temporary injunction, and the dismissal of the suit. Plaintiff appeals.

As we see the case, it will not be necessary to review the evidence in detail, nor seek to harmonize the conflicts thereof. It must be conceded that, if a court of equity could rightfully take jurisdiction of the case, that jurisdiction must be founded and based upon the right of plaintiff to a reformation of the contract of lease by which it can be made to conform to the contract and intention of the parties. It is a well-settled rule of equity jurisprudence that, in order to secure a reformation of a written contract, the evidence must be clear, convincing, and satisfactory that the contract as written does not reflect the real contract and agreement of the parties. *Slobodisky v. Phoenix Ins. Co.*, 52 Neb. 395. The burden of proof is, of course, upon the party seeking the relief. As we have said, there was a sharp and irreconcilable conflict in the evidence, plaintiff testifying that the agreement was that he was to have a lease for one year with the privilege of extending it to five years, and in which he is supported by the testimony of witnesses that defendant had admitted that such was the agreement, while defendant as posi-

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tively asserted upon the witness stand that no such agreement was ever made. The testimony of the scrivener who drew the lease is equally positive that the terms of the lease in its details were dictated to her by the parties; that nothing was said about an extension of the lease; that she read the lease in full to the parties, to which both agreed before signing, the contract being left with her for safe keeping, she furnishing plaintiff a copy thereof some weeks or months thereafter. There is also testimony of statements made by plaintiff to the effect that he had rented the farm for one year. The alleged admissions were denied by both parties, and in each instance their denials were supported by witnesses who were present and heard the conversation in which the admissions were said to have been made. Applying the well-known rule of equity to the evidence, we are constrained to hold that it was not sufficient to justify a reformation of the contract, and that the district court was right in so holding. The issue upon the effort to reform the contract being the only one of equitable cognizance, the suit was rightly dismissed. As every other question can be fully tried in the suit at law, which is still pending in the court of the justice of the peace, we cannot see our way to reverse the judgment of the district court.

The judgment of the district court is therefore

AFFIRMED.

LETTON, SEDGWICK and HAMER, JJ., not sitting.

AUSTIN M. BROWNFIELD, APPELLANT, V. CITY OF KEARNEY
ET AL., APPELLEES.

FILED OCTOBER 17, 1913. No. 17,974.

1. **Municipal Corporations: LIGHTING PLANT: BOND ISSUE.** In order to the legal issue of bonds for the construction of a municipal lighting plant in cities of the class having a population of from 5,000 to 25,000 inhabitants, it is necessary that the provisions of section 54 of the city charter (Comp. St. 1911, ch. 13, art. III) be followed and complied with.
2. ———: ———: **STATUTES: REPEAL BY IMPLICATION.** The provisions of that section having been enacted and re-enacted subsequent to the passage of sections 1 and 2, art. V, ch. 14a, Comp. St. 1911, supersede the latter act wherein there is a conflict in their provisions.

APPEAL from the district court for Buffalo county:
BRUNO O. HOSTETLER, JUDGE. *Reversed with directions.*

Thomas F. Hamer and Warren Pratt, for appellant.

H. M. Sinclair and N. P. McDonald, contra.

REESE, C. J.

On the 14th day of February, 1912, the mayor and council of the city of Kearney submitted to the electors of the city a proposition to issue the bonds of the city in the sum of \$40,000 for the purpose of raising money to pay for the construction of a municipal lighting plant and system for the use of the city and its inhabitants. There were 1,086 votes cast at the election, of which 618 votes were cast in favor of the proposition and 468 votes against it. The proposition was declared carried, the bonds prepared, submitted to and registered by the state auditor of public accounts, and delivered to the state treasurer on an executory contract between the city and state treasurer for their sale to the school funds of the state; but the money was not paid for them, they remaining in the possession of

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the state treasurer, when a temporary injunction was issued, the whole matter stayed, and still rests *in statu quo*. The cause was tried in the district court, the trial resulting in a finding in favor of defendants, the temporary injunction dissolved, and the plaintiff's petition dismissed. Plaintiff appeals.

The petition is of considerable length, and attacks the proceedings in the matter of the issuance of the bonds with careful particularity, beginning with the alleged want of power to issue bonds for so great an amount, the alleged irregularities in the proceedings antedating the election, the lack of a sufficient majority of votes in favor of the issue, resulting in the defeat of the proposition. The answer admits the averments of the petition as to the corporate character of the city, the official positions of the defendants, mayor, councilmen, etc., that the election was held and the number of votes polled, the number of votes in favor and the number against the proposition, and the making and registration of the bonds, as alleged. All other averments of the petition are denied. In view of the contentions of the parties as to the ruling question presented, it is not deemed essential that the pleadings be further noticed in detail. Nor do we deem it necessary to dwell upon the evidence adduced upon the trial.

Practically the whole contention is centered upon whether the provisions of section 54, art. III, ch. 13, Comp. St. 1911 (embodied in the city charter), or whether sections 1 and 2, art. V, ch. 14a, Comp. St. 1911, are to be applied and held to be the law, by which the city council and the people should have been governed. It is insisted by plaintiff (appellant) that the provisions of section 54, *supra*, should have been complied with by the council, and, if so, the bonds are void. This section requires a three-fifths majority vote in order to authorize the issue of bonds. It is conceded that there was not that majority in favor of the proposition. It is contended that the powers of the city council did not depend upon that section, but that their action was taken under the provisions of sec-

tions 1 and 2, art. V, ch. 14a, Comp. St. 1911, and that upon those sections, and those alone, do defendants rely as giving authority for the action taken by the city council.

An examination of the legislation as contained in the two somewhat antagonistic provisions shows that section 54, art. III, ch. 13, Comp. St. 1911, was passed in 1901, and has been practically continued, but with later amendments, until 1909, when it was re-enacted, with slight modification, by House Roll No. 129 (laws 1909, ch. 19) as it appears in sec. 54, art. III, ch. 13, Comp. St. 1911. Sections 1 and 2, art. V, ch. 14a, Comp. St. 1911, appear to have been enacted in 1901, and to have remained as then passed until 1903, when chapter 25, laws 1903, was passed, since which time no change or amendment has been made, and they now stand as sections 1 and 2, art. V, ch. 14a, Comp. St. 1911. We find it impossible to hold that the later enactments of section 54, *supra*, of the city charter, must not govern and control the powers of the mayor and council as the last expression of the legislative will, and that wherein it conflicts with the section relied on by the city the latter must give way. We are not unmindful of our decision in *State v. Searle*, 76 Neb. 272, decided in 1906, where a quite similar question was presented, but upon the earlier statutes. The later enactments of the legislature seem to render it certain that the powers of the city council are to be limited thereby. We can see no escape from this conclusion, and that the amended charter as it existed at the time of the submission and election must govern and be complied with. This not having been done, it follows that the bonds are invalid.

The decree of the district court is therefore reversed and the cause is remanded, with directions to that court to reinstate the cause and enter a decree rendering the injunction perpetual.

REVERSED.

LITTON and FAWCETT, JJ., not sitting.

**S. W. JACOBY, ADMINISTRATOR, APPELLEE, v. PRUDENTIAL
INSURANCE COMPANY OF AMERICA, APPELLANT.**

FILED OCTOBER 17, 1913. No. 17,216.

1. **Insurance: APPLICATION: FRAUD: REVIEW.** Where the question as to the truth or falsity of the answers made by the assured in an application for a policy of life insurance are submitted to a jury upon conflicting evidence, and under proper instructions, and their finding is that the answers were not false or fraudulently made, the verdict will not be set aside, unless it is found to be clearly wrong.
2. **Instructions examined, and found to be, as applied to the evidence, a fairly correct statement of the law.**

APPEAL from the district court for Box Butte county:
JAMES J. HARRINGTON, JUDGE. *Affirmed.*

Eugene Burton and William Mitchell, for appellant.

B. F. Gilman, B. F. Swisher and Lloyd H. Brown, contra.

BARNES, J.

Action on a policy insuring the life of Michael L. Jacoby for the sum of \$2,000, brought by S. W. Jacoby, as administrator of the estate of the insured, against the Prudential Insurance Company of America. A trial to a jury in the district court for Box Butte county resulted in a verdict for the plaintiff, on which judgment was entered, and the defendant has appealed.

The petition was in the usual form, and the answer interposed two defenses: First, that the first premium for which the policy was issued was not paid; second, that the answers of the assured in the application for the policy, and on which it was based, were false and were fraudulently made; that they were warranties, without which the policy would not have been issued, and it was therefore void. It was also contended that, if the answers in question were not warranties, they were representations ma-

terial to the risk, which were relied on by the defendant, and without which the policy would not have been issued; that they were false, fraudulent and untrue, and therefore the policy was rendered void. The question of non-payment of the first premium seems to have been abandoned. It is not referred to in appellant's brief or argument, and therefore will not be considered in this opinion.

It appears that the policy in suit was issued on the 30th day of April, 1904, and by agreement was dated as the 2d day of February of that year. The application for the policy was made on the 25th day of April, 1904, and in the application one question put to the assured was: "Have you ever used malt or spirituous liquors to excess?" To this question the assured answered, "No." Then followed the question: "State the quantity you used each day of malt liquors, wines, spirits?" Answer, "None, none, none." To establish the falsity of the above answers, defendant produced several witnesses whose testimony tended to prove that the assured was addicted to the use of intoxicants, and it was claimed that when the assured died he had under his head an empty bottle which smelled of intoxicating liquor. It must be observed, however, that very few, if any, of the witnesses ever saw the assured drink any intoxicating liquor; but it seems to have been the opinion or impression of those witnesses that he had been frequently intoxicated. None of them could testify to more than twice when it was claimed by them that the assured was under the influence of intoxicating liquors. It may be conceded, however, and we think the testimony fairly establishes, that the assured was somewhat intoxicated on one occasion in October, 1903.

On the other hand, James Graham, in whose store the assured worked as a butcher or meat-cutter from November, 1903, to within two weeks of his death, testified, in substance, that Jacoby was employed by him at the time he signed the application for insurance, and had been in his employ for nearly six months; that Jacoby worked for

him continuously up to within two weeks of June 10, 1904; that during all of that time he never knew of Jacoby taking a drink.

Al Wiker, one of the defendant's witnesses, was night marshal at Alliance, Nebraska, from May, 1903, to June or July, 1904. He testified that during that time he saw Jacoby intoxicated once in the summer or fall of 1903, and once in 1904, but that he never saw him take a drink in his life.

Edwin O'Donnell, one of plaintiff's witnesses, testified that Michael L. Jacoby worked for him in his butcher-shop from December 6, 1902, until March 31, 1903; that he had occasion to observe Jacoby's habits, and that he was a temperate man; that the only time he ever saw him drink anything was occasionally on Saturday nights after he had finished work, between 11 and 12 o'clock, when he and Jacoby would drink a bottle of beer and eat a dish of oysters together; that on those occasions Jacoby never drank more than one bottle of beer; that he never laid off during the time he worked for this witness; that he never saw Jacoby drunk, although he saw him every day during that period of time.

John Leith, one of plaintiff's witnesses, testified that Jacoby worked for him on his farm from July to November, 1903, and that he did not drink while in his employ, or at any other time, as far as he knew; that he saw him nearly every time he went to town, and that he never saw him drunk or drinking any intoxicating liquor.

It appears from the testimony that little was known of the assured prior to about three years before his death, when he came to Alliance. It also appears from the testimony of the witnesses Graham, O'Donnell and Leith that from December, 1902, until the time of his death, with the exception of a short period in the summer of 1903, deceased was employed and worked steadily without losing any time, was absolutely and strictly a sober man, not addicted to the use of intoxicating liquors to any extent; and it must be observed that these men were in a position

to see and know Jacoby, and had every opportunity to observe and know his habits with reference to the use of intoxicating liquors. The witness Graham testified that the deceased did not drink at all while in his employ. It was during the time he was employed by Graham that he signed the application, and when he made answer to the question as to the quantity of malt, wine and spirits he used each day he truthfully answered, "None." The testimony of Graham was supported by the evidence of Henry Blumb, who worked with Graham while Jacoby was employed by Graham.

In addition to this testimony, Doctor L. W. Bowman, who was in the employ of the defendant insurance company as medical examiner, gave testimony touching upon the question of the truthfulness of Jacoby's answer to the question that he had never used malt or spirituous liquors to excess. In answer to questions asked Doctor Bowman, he testified that he made a thorough physical examination of Jacoby, and certified all statements in his report to be true; that his examination was made on April 25, two months before Jacoby died; that he had known Jacoby for two years; that he had no reason to suspect him of intemperate habits; that he found nothing wrong at all with his heart; that his nervous system was perfect, and he found no signs at all of excessive use of intoxicating liquors; that he found him free from all mental and physical defects, and in good health, and passed him as a first-class risk.

Considering this case in the light of the evidence, we are of opinion that the jury were justified in finding that the answers of the assured were not untrue, false or fraudulent.

Complaint is made of the third and fifth paragraphs of the instructions given by the trial court to the jury. By instruction No. 3, the jury were told, in substance, that the only questions presented for their consideration were: Did the deceased ever use wine or spirituous liquors to excess prior to the time of making the application for the

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policy on which this action was brought? or did he use some quantity of either malt liquors, wines or spirits daily at the time of making said application? and if they found that the deceased prior to the time he made said application had used malt or spirituous liquors to excess, or some quantity each day of either malt liquors, wines or spirits, the plaintiff could not recover. But if the defendant had failed to establish all of those facts by a preponderance of the evidence, or if the evidence as to those facts should be equally balanced or preponderate in favor of the plaintiff, then their verdict should be for the plaintiff. By instruction No. 5, the jury were told that if they should find from the evidence that the deceased did not, prior to the time of making the application for insurance, use malt, wine or spirituous liquors to excess, and at the time he made said application he did not use any quantity each day of either malt liquors, wines or spirits, the fact that the deceased may have used either wines, malt or spirituous liquors, either daily or to excess after the policy was issued, would not relieve the defendant company from liability. We think these instructions could hardly be misunderstood. The question at issue seems to have been fairly submitted to the jury, and the appellant's criticisms of the instructions are not merited.

Therefore, following the rule announced in *Kettenbach v. Omaha Life Ass'n*, 49 Neb. 842, *Omaha Life Ass'n v. Kettenbach*, 55 Neb. 330, and *Aetna Ins. Co. v. Simmons*, 49 Neb. 811, the judgment of the district court is .

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

ELLA L. DAVIES ET AL., EXECUTORS, APPELLEES, v. AMERICAN INVESTMENT & TRUST COMPANY, APPELLANT.

FILED OCTOBER 17, 1913. No. 17,314.

1. **Taxation: FORECLOSURE OF LIEN: PUBLICATION OF NOTICE.** A district court is without jurisdiction to render a default decree foreclosing a tax lien where service upon the owner of the land is made by publication only, the notice having been published only seven times in a semi-weekly newspaper. *Claypool v. Robb*, 90 Neb. 193.
2. ———: ———: **VOID DECREE: RIGHT OF REDEMPTION.** The payment of all delinquent taxes, both before and subsequent to the entry of a void tax foreclosure decree, with interest and penalties, where the land is unimproved, is sufficient to meet the demands of equity and enable the owner to redeem.

APPEAL from the district court for Lincoln county:
HANSON M. GRIMES, JUDGE. *Affirmed.*

William E. Shuman, for appellant.

E. H. Evans, contra.

BARNES, J.

Action in the district court for Lincoln county to redeem the northeast quarter of section 29, township 13, range 32, situated in that county, from the lien for taxes, and to quiet the title thereto in the plaintiffs. A trial resulted in a decree for the plaintiffs, and the defendant has appealed.

It appears that Ella L. Davies and Elliot L. Davies are the heirs of Thomas J. Davies, deceased, and, together with W. H. Warner, are executors of his estate; that as such executors they commenced this action against the American Investment & Trust Company and others, alleging in their petition that Thomas J. Davies, at the time of his death, was the owner of the land in question; that in the year 1901 Lincoln county commenced an action of foreclosure to subject the land to the lien for delinquent taxes for the years 1895 to 1900, inclusive. Service was

had upon the defendant by publication. There was a decree of foreclosure, and thereafter the land was sold to Lincoln county. November 12, 1906, the county conveyed the land to Edward R. Goodman, who subsequently, with his wife, conveyed it to the defendant, the American Investment & Trust Company; that the defendant and its grantors have paid all of the subsequent taxes upon this land, and have been in possession of it ever since it was sold by the county to Goodman. Some time after the sheriff's deed conveying the land to Lincoln county had been delivered, Thomas J. Davies, who held the title to this land by an unrecorded deed at the time of the county tax foreclosure suit, died, and the plaintiffs became executors of his estate. This case was tried in the district court upon a stipulation reciting the material facts in question, and therefore nothing but questions of law are involved in this appeal.

The record contains many assignments of error, but one of which is necessary for a determination of this appeal. Service of summons in the foreclosure tax suit was by publication only, and it appears from the proof of publication that the published notice, a copy of which is in the record, was published in a semi-weekly newspaper, published and in circulation in Lincoln county. The affidavit recites: "That the notice, a copy of which is hereto attached, was published in said newspaper for four consecutive weeks, the first publication having been made on the 14th day of February, 1902, and the last on the 7th day of March, 1902; that said notice was published in the regular and entire issue of every number of said newspaper during the period and time of publication." There was no appearance by any one in the tax foreclosure suit, and in this action the trial court found that the court had no jurisdiction to render the tax foreclosure decree. It is alleged that the district court erred in this finding.

The question of the sufficiency of a like notice which was published in the same paper and for the same length of time was before this court in *Claypool v. Robb*, 90 Neb.

193, and it was there held: "The provision of section 79 of the code that 'the publication must be made four consecutive weeks' is satisfied by a publication in a weekly newspaper once in each week for four weeks successively. But, where the notice is published in a paper having more than one issue during the week, insertion of the notice in each of the regular issues during the week is necessary to a complete publication of the notice for that particular week." In the discussion of the question in the opinion there appears the following: "It is clear that, if the paper in which the publication was made had been published weekly, a notice published on four Fridays would have been sufficient. We think, however, that, while statutory requirement is satisfied by publication in four successive issues of a weekly newspaper, publication in the entire number of issues for each week is necessary to constitute a weekly publication in a paper having more than one issue in each week. In other words, publication in all the regular issues of the paper during the week, whether daily, semi-weekly or weekly, is necessary to the complete publication of the notice for that particular week. *Sterens v. Naylor*, 75 Neb. 325; *Union P. R. Co. v. Montgomery*, 49 Neb. 429; *Union P. R. Co. v. McNally*, 54 Neb. 112. In the cases cited the publication was required to be 'for' the time specified, but we think the decision in this case does not rest upon that distinction, but on the thought that a publication is not complete for any week, unless inserted in every issue of the paper for that week. If we consider each week as beginning on Sunday, the publication for the first week was insufficient, since it did not appear in the two issues of the paper; while, if we consider that each week consists of seven days, beginning with the date of the first publication, the notice is equally insufficient, since there was a later issue of the paper in the last week of publication in which the notice did not appear. Under this rule, it is apparent that the notice was not published for four consecutive weeks. We are not unmindful of the fact that a number of courts have held that under a sim-

ilar statute a publication in a daily or semi-weekly newspaper once in each week is sufficient, but this court has always been inclined to construe with strictness the provisions of the statute allowing constructive service."

The question was before us again in *Smith v. Potter*, 90 Neb. 298, where the holding in *Claypool v. Robb* was affirmed. *Smith v. Potter* was again before the court, and the opinion is found in 92 Neb. 39, where the former decision was adhered to, but it was held that the testimony showed that the notice in that case was sufficient.

It is contended by the appellant that the statements contained in the affidavit, quoted herein, that the notice had been published four consecutive weeks was conclusive. But in the light of the subsequent particular facts set forth, giving the dates and the times of publication, we think this contention is unsound. The statements contained in the affidavit should be considered together, and it follows that, where the particular facts are stated, such statement governs the general conclusion that the notice was published for four consecutive weeks. It sufficiently appears that the notice was only published seven times, whereas it should have been published eight times in order to complete the service.

It follows that the trial court was right in its finding that the court was without jurisdiction to render the tax foreclosure decree. This holding renders it unnecessary for us to determine the other assignments found in the record. It is proper, however, to say that the sheriff's deed was issued on the 21st day of July, 1902, and the county sold the land to Edward R. Goodman in November, 1906, who recorded his deed, and in October, 1907, Goodman sold the land to the defendant investment company. The decree is silent as to possession, and the land was unimproved. It is apparent, therefore, that the ten-year limitation had not expired when this action was commenced. The court required the plaintiffs to pay all of the taxes, interest, penalties and costs as a condition of redemption.

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It follows that the judgment of the district court was right, and it is therefore

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

STATE OF NEBRASKA V. SEVERAL PARCELS OF LAND.

A. J. SEAMAN, HOLDER OF TAX CERTIFICATE, APPELLEE, V.
HUBERT C. ROBERTSON, OWNER, APPELLANT.

FILED OCTOBER 17, 1913. No. 18,028.

1. **Taxation: FORECLOSURE OF LIEN: CORRECTION OF DECREE.** Under the provisions of chapter 75, laws 1903 (Comp. St. 1903, ch. 77, art. IX), commonly called the "Scavenger Tax Law," the district court has the power to vacate a decree rendered by default which contains void taxes, and enter a valid decree in lieu thereof, at any time before the final confirmation of sale.
2. ———: ———: **REDEMPTION: INTEREST.** In order to redeem a tract of land which has been sold under the scavenger foreclosure decree, the owner is required to pay the amount of the decree, with interest at the rate provided for in the statutes relating to scavenger tax sales.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Affirmed.*

B. N. Robertson, for appellant.

Leavitt & Hotz, contra.

BARNES, J.

This is an appeal from a judgment of the district court for Douglas county, confirming a sale of lot 2, block 458, Grandview addition to the city of Omaha, for delinquent taxes, under a decree in a scavenger foreclosure suit.

It appears that the action in which the decree was rendered was commenced in 1904, and on the 21st day of September of that year a default decree was entered. On

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the 27th day of February, 1905, the lot in question was sold to the city of Omaha, and a certificate of sale was delivered to the purchaser; the city never assigned the certificate, and no further proceedings were had under the decree until July 27, 1909, when the plaintiff asked leave to have the decree set aside for the purpose of correcting it and excluding therefrom certain void special taxes. The city surrendered the certificate of purchase and had the same canceled, and thereupon the court made the following order: "This cause came on for hearing upon the motion of the plaintiff, represented by the assistant city attorney of the city of Omaha, made in open court, for an order to set aside the sale heretofore made and the decrees heretofore entered in this suit against the following tract or numbers, to wit: * * * Tract No. 12,126, being lot 2, block 458, Grandview addition, * * * all in the city of Omaha, Douglas county, Nebraska, for the reason that the said decrees herein with reference to each of said tracts were entered by default and included therein void taxes or special assessments, and for said reason confirmation of sale cannot be had over the objection of the owner of each of said tracts, and that, to obtain a valid sale thereof, it is necessary to vacate the present sale and the decree heretofore entered against each of said tracts. The court, being fully advised in the premises, finds that for the reasons stated therein the motion should be sustained; and it is therefore ordered and adjudged that the sales heretofore made and the decrees heretofore entered against each of said tract numbers be, and the same hereby are, vacated and set aside, and it is ordered that said case stand for hearing with reference to each of said tracts." On the 4th day of August, 1909, the court entered by default the decree under which the sale in question was made. There was no notice that the plaintiff would ask the court for the order entered on the 27th day of July, 1909, and there was no appearance by any of the defendants at the hearing on the motion. The decree now in question was rendered on the original petition filed by the state of Nebraska as

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plaintiff when the case was commenced in 1904, and there was no appearance by the defendants, or any of them, on or at the hearing when the decree of August 4, 1909, was rendered. The decree ordered the property sold to enforce the payment of the amount of taxes found due against the lot in question, which was the same tax that was set out in the petition when the action was commenced in 1904, with the exception that the void taxes were eliminated. On the 8th day of November, 1909, the county treasurer sold the property under the new decree to A. J. Seaman. On Seaman's application to confirm the sale the owner of the lot appeared and contested his right to confirmation. The court ordered the sale confirmed, and it is now the contention of the owner: First, that the order of the court is not sustained by sufficient evidence; second, that the order of the court is contrary to law; third, that the owner of the property has the right to pay his taxes and assessments without regard to the decree of foreclosure in question.

It is argued that the court had no jurisdiction to render the decree of August 4, 1909, and therefore it was error to confirm the sale. We think this contention cannot be sustained. The statute under which these proceedings were prosecuted (laws 1903, ch 75), among other things, provides, in substance, that the state tax suit may be instituted against all lots and parcels of land against which there are unpaid delinquent taxes. The proceedings up to the time of the confirmation of the sale are summary in their nature, and no provisions are made for setting aside the sale, or attacking it in any manner, until confirmation is asked for. At that time interested persons may interpose their objections, as was done in this case. *Prudential Real Estate Co. v. Battelle*, 90 Neb. 549.

In *State v. Several Parcels of Land*, 81 Neb. 770, it was held: "Where taxes which are void and illegal are included in a default decree rendered under the provisions of article IX, ch. 77, Comp. St. 1907, commonly known as the 'Scavenger Law,' and the attention of the court is

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called thereto by suitable objections to a motion to confirm, such motion should be denied, and the error in the decree corrected."

In the case of *State v. Several Parcels of Land*, 75 Neb. 538, the question before this court was the right of an owner to open the default decree and defend the action because he had not had notice of the commencement or pendency of the suit, and the court held that the provisions of the statute granting the landowner the right to object to the confirmation of sale, and define the ground of objection, afforded him an opportunity to have the question of the validity of the taxes determined before he is deprived of the property; but he may be required to wait until confirmation is applied for to litigate that question. The court refused to open the default upon the ground that the question of the validity of the taxes might be determined upon the application to confirm the sale.

The state of Illinois enacted a scavenger law at an early day, and several other states have adopted similar legislation. Our statutes seem to have been largely taken from that of Minnesota. But as the Minnesota statutes contain no provision for the confirmation of sales, the construction placed upon it is of no assistance to us, except as indicating how our statutes should be construed had the provisions contained in sections 38 and 39 been omitted therefrom. It is probable that these sections were adopted in order to give the owner the rights which are secured to him in administrative sales for taxes by section 3, art. IX of the constitution.

In *State v. Several Parcels of Land*, 81 Neb. 770, it was said: "It is urged that the proceedings prescribed by the statute are judicial in their nature, and that the decree rendered in pursuance of section 11, *supra*, is final and conclusive, and that it is inconsistent with this view to say that such decree may be opened up or assailed on confirmation. It is a canon of construction that an interpretation which gives effect to all parts of the statute should be sought for, and, if possible, adopted. In this

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case all that is urged on behalf of the conclusive character of the decree might be admitted when such decree is attacked in another action or after confirmation, and at the same time effect might be given to the provisions of section 39." Other expressions contained in this opinion seem to convey the idea that the court, having obtained jurisdiction by the commencement of a scavenger foreclosure suit, retains such jurisdiction over all of the proceedings up to the final confirmation of the sale, and we are inclined to hold that the court has such jurisdiction, and has full power and authority to correct the decree by eliminating void taxes, and thus render it possible to correct any errors at any time while the proceedings are pending.

In *Prudential Real Estate Co. v. Hall*, 79 Neb. 805, it was said: "The decree, as affecting the tract involved, was by default, and by it the owner was not deprived of the legal right to have the validity of the taxes determined prior to the confirmation of the sale." On the rehearing in that case (79 Neb. 808) it was said: "The statute pursuant to which this proceeding is had requires of the court the exercise, so far as may be, of the powers of a chancellor in foreclosure cases. It is not doubted that in such cases the court is the vendor, or that he may reject any bid which for any reason appears to him to be inadequate, or that, while the proceeding remains within his jurisdiction, he may vacate any erroneous or improvident order he may have made during its progress. The statute in question does not express an intent either to enlarge or restrict, or in any way to affect, the exercise of this power, which has heretofore been regarded as inherent in a court of equity, and of which it may be doubted that the legislature has the power to deprive it." It may be said that by the application to set aside the confirmation the owner submitted to the jurisdiction of the court. In *State v. Several Parcels of Land*, 75 Neb. 538, it was said: "(1) A person against whose property a default decree upon constructive service has been rendered in a

a tax suit under the 'Scavenger Law' (Comp. St. 1903, ch. 77, art. IX, secs. 1-48) is not entitled, as a matter of right, to have the same opened up after the term, either under the provisions of section 82 of the code, or under the general equity powers of the court. (2) The provisions of the statute granting the landowner the right to object to the confirmation of sale, and defining the ground of objection, afford him an opportunity to have the question of the validity of the tax determined before he is deprived of his property; but he may be required to wait until confirmation is applied for to litigate that question."

From an examination of the scavenger tax law and the foregoing decisions, we conclude that the district court has jurisdiction to set aside and correct a default decree, and enter a corrected decree in its place, under which a confirmation of the tax sale may be had.

Finally, it is contended that the owner had the right to pay the tax assessed against his lot, regardless of the scavenger tax suit and the decree in question, by paying the amount of the tax, with the interest thereon at the rate provided for by the general tax laws. It appears that on the 28th day of November, 1911, the owner tendered to the treasurer of the city of Omaha, the amount of the taxes in question, together with 10 per cent. interest, and \$1 as a docket fee, and such payment was refused because of the pendency of the scavenger tax foreclosure suit. The defendant has kept that tender good. By this he seeks to avoid the payment of interest, as provided by the scavenger tax law, upon the decree rendered on the 4th day of August, 1909. Having held that the decree was not void, it follows that the tender in question was insufficient in amount. The owner could only redeem from the decree by paying the same, together with the interest due thereon according to the provisions of the scavenger tax law.

It follows that the judgment of the district court was right, and it is therefore

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

JOHN GILLIGAN, APPELLEE, v. JOHN GILLIGAN COMPANY,
APPELLANT.

FILED OCTOBER 17, 1913. No. 16,824.

1. **Corporations: ACTION ON NOTE: ESTOPPEL.** In this an action against a corporation to recover upon a promissory note duly authorized and executed by its officers, the defendant denied its legal existence as a corporation. *Held*, That under section 144, ch. 16, Comp. St. 1911, such a defense is not permissible.
2. **Bills and Notes: ACTION: DEFENSES.** Under the facts set forth in the opinion, *held* that the defense of fraud and no consideration were not established.
3. **Appeal: CONFLICTING EVIDENCE.** The findings and judgment of a district court, in a law action tried without a jury, based upon conflicting evidence will not be set aside unless clearly wrong.

APPEAL from the district court for Richardson county:
JOHN B. RAPER, JUDGE. *Affirmed.*

Edwin Falloon, for appellant.

Paul Jessen and Matthew Gering, contra.

LETTON, J.

Prior to 1906 the plaintiff, John Gilligan, was engaged in the business of contracting and bridge building at Falls City, Nebraska. His business was quite extensive, being carried on in a number of states. On or about September 18, 1906, he sold and transferred the entire business to the defendant, the John Gilligan Company, a corporation which was formed for the express purpose of purchasing and carrying on the business. At the time of the sale an inventory or estimate was made out and shown to the prospective stockholders, specifying in detail the character of the assets and property and the value of the respective items of the same. Sixty thousand dollars par value in stock was delivered to Mr. Gilligan in payment for the business. Afterwards, about March 22, 1907, it was discovered that a number of the items scheduled had ap-

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parently been overvalued, and the plaintiff then voluntarily surrendered to the corporation shares of stock to the amount of \$18,500 in face value in order to reduce the consideration money sufficient to offset the excessive valuation. Immediately after the sale of the business the corporation took charge of it and carried it on. One of the contracts on hand was concerned with drainage or ditching work in Iowa. Mr. Gilligan was not satisfied with the manner in which this work was being managed and dissension arose among the directors. It was then proposed to terminate entirely Mr. Gilligan's connection with and interest in the corporation, by the corporation itself and some of the other stockholders buying the remainder of his shares of stock. This was accordingly done. Two shareholders purchased a portion of the shares and the corporation itself took the remainder at the agreed price of \$4,000. This amount was evidenced by two promissory notes of the corporation for \$2,000 each. One of these notes was sold by the plaintiff. This suit is brought to recover the amount due upon the other.

The defendant corporation by its answer admitted the execution and delivery of the note, and as a defense alleged that it was given without consideration and was obtained by fraud. In a cross-petition it alleged that in September, 1906, the plaintiff fraudulently induced W. H. Crook and five others (naming them) to take stock and form the corporation, representing that he had \$60,000 invested in the bridge and contracting business, and that the investment was netting him 20 per cent. per annum; that, relying on these representations, the persons named became stockholders and paid in the sum of \$8,000. It also avers that the property was fraudulently overvalued and the debts understated in the written statement of assets and liabilities, and denies that plaintiff had any goodwill in a number of counties in this and other states for which large amounts were charged in the inventory; that the articles of incorporation were void because not properly signed by the incorporators; that about June 20,

1907, "the plaintiff commenced fighting the business interests of defendant for the purpose of compelling defendant to buy his stock," and that, not knowing the true condition of affairs, defendant bought about one-half of his remaining stock in the corporation, Gilligan agreeing not to compete in certain counties, the other half being bought by stockholders; that the sale was void for the reason that the corporation could not purchase its own stock; that it was against public policy for the corporation and Gilligan to enter into an agreement that Gilligan would not compete against the defendant at any public bridge letting; that Gilligan was insolvent at the time the corporation was formed, and fraudulently procured the stock from the defendant at that time, and that therefore the later sale of the stock and the notes given therefor were without consideration. Ignorance of the frauds until after the notes herein sued upon had been signed and delivered is also averred; and it is claimed that there is now due defendant from plaintiff the sum of \$38,201.83.

In reply the plaintiff alleges the defendant is estopped to deny its corporate capacity; pleads that the notes were executed by defendant with full knowledge of the affairs of the corporation and of the value of the stock; that the statement was honestly made from the books; and he denies specifically any attempt to defraud. The court found for the plaintiff, and defendant appeals.

In this court defendant contends that the judgment is not sustained by sufficient evidence; that it was never lawfully organized as a corporation; that all notes given by it were void for the reasons that it was incorporated by one person; that its paid-up capital stock did not exceed \$6,000; and that the plaintiff was guilty of fraud in organizing the corporation and procuring the note.

The evidence is voluminous and seems to show that the business, both before and after the sale, had been loosely conducted, but we think it unnecessary to consider it in detail.

1. Section 144, ch. 16, Comp. St. 1911, provides: "No

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body of men acting as a corporation under the provisions of this subdivision shall be permitted to set up the want of legal organization as a defense to any action brought against them as a corporation." In *Livingston Loan & Building Ass'n v. Drummond*, 49 Neb. 200, it was held that a defendant sued as a corporation cannot deny its existence either in abatement or in bar. If the defendant is not a corporation, it cannot appear as such and plead in that capacity. Even if the state were able to question the legal existence of the corporation upon sufficient ground, the defendant could not avail itself of the lack of legal existence and thus commit a sort of legal hara-kiri in a collateral action of this nature. 10 Cyc. 1065, 1066, 1157, 1158, and notes.

2. As to the contention that the note was procured by fraud: The evidence shows that Mr. Gilligan largely relied upon his books as showing the condition of his business affairs before the corporation was organized. The statement which was submitted to the incorporators, and which seems to have been taken from the books, so far as tangible property is concerned, placed a heavy valuation upon "good-will" in certain counties in this and other states. The purchasers were thus apprised that "good-will" in a business which was open to public competitive bidding was one of the articles which they were buying, but they seem to have made no protest as to such an intangible and visionary asset or to question the value placed thereon. Apparently they had ample opportunity to make inquiry and investigation before they purchased and no artifice was employed to hinder them. Mr. John A. Crook, a stockholder who was elected secretary in January, 1907, had been employed in the business since before 1900, and apparently was as familiar with its affairs as Gilligan himself. On March 22, 1907, when it had been definitely ascertained that an overvaluation had been made as to some items, Gilligan voluntarily surrendered to the corporation stock which was presumably agreed to be equal in value to the excess in valuation. Apparently

no further complaint was made. When friction arose between Gilligan and Crook, negotiations were entered into which resulted in the ousting of Gilligan and the transfer of his remaining stock in consideration of the execution of the two notes. At this time the corporation had been in full control of the business from September, 1906, to June, 1907. Large amounts of money had been received upon contracts and large amounts expended under the authority of the directors of the corporation. No court could have the facilities for ascertaining the true value of the assets that this corporation had during the months in which it was in control of the business; and at the time it closed the transaction with Gilligan by the purchase of his stock it was apparently in full possession of all the facts and knew the true value of the stock as well as he did. If the price that it paid was excessive, it bought it with its eyes open and obtained just what it purchased. It is not claimed that any false representations were then made.

3. The contention is made that the sale of the stock was illegal and void for the reason that a part of the consideration was an agreement on the part of Gilligan not to compete in Otoe county. It seems apparent that the desire to oust Gilligan was the principal motive for the purchase of the stock. The finding of the trial court in favor of the plaintiff on this point seems to be supported by sufficient evidence though the evidence is conflicting.

We find no reason to set aside the judgment of the district court, which is therefore

AFFIRMED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

ETHEL S. BENTLEY, APPELLEE, v. HENRY V. HOAGLAND,
SHERIFF, APPELLANT.

FILED OCTOBER 17, 1913. No. 17,332.

Appeal: VERDICT: EVIDENCE. Where the verdict of a jury is clearly against the weight and reasonableness of the evidence, it will be set aside and a new trial granted.

APPEAL from the district court for Lancaster county:
WILLARD E. STEWART, JUDGE. *Reversed.*

Burr, Greene & Greene, for appellant.

George A. Adams and B. F. Johnson, contra.

LEETON, J.

Plaintiff is the wife of William A. Bentley. A former wife, Christena Bentley, had been divorced from Bentley, and had recovered a judgment for alimony in the sum of about \$2,000 which was unsatisfied. Plaintiff and Bentley had some differences, and plaintiff left his home and went to Kansas City. While there she received a letter from L. C. Burr, attorney for the former wife, asking her assistance in the collection of the judgment for alimony, and offering to pay a commission on any money collected on the judgment by her assistance. She came to Lincoln, and, according to the testimony of Mr. Burr and two other witnesses, she stated that the automobile, the ownership of which is in controversy in this action, belonged to Bentley, though she had furnished part of the money to pay for it, and she entered into a written instrument, the purport of which was a recital that Mrs. Christena Bentley was about to issue an execution against Bentley, a statement by her as to Bentley's ownership of the machine, and an agreement that Christena would levy on the automobile, a fur coat, a piano and a sewing machine, and that she (Christena) would bid in the piano and sewing machine at the sale and turn them over to the

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plaintiff herein, and pay her expenses from Kansas City; the plaintiff also waived any right to the property levied on and granted the same to Christena. A levy was made upon the automobile, plaintiff pointing out and assisting the deputy sheriff in so doing. Afterwards she became reconciled to Bentley and began this action to recover the automobile. The property was taken under the writ, but no bond was given, and it was returned to defendant. The action then proceeded as one for damages under section 193 of the code.

The testimony of the plaintiff was, in substance, that she furnished the money to buy the machine, borrowing part of it from a bank, and that it was her property. She further testified that the paper introduced in evidence bearing her signature, which disavowed ownership, was not signed by her intentionally; that there were two pages of the document; and that Mr. Burr without her knowledge substituted the page she signed for another of entirely different purport. She denied that she pointed out the automobile to the officer or that she stated to him that it belonged to Bentley. Her mother and a sister gave testimony tending to support her in some matters. On the other hand, this testimony as to the occurrence in the law office is contradicted by a number of witnesses, and the deputy sheriff and Mr. Marlay both testify that she pointed out the machine. The sheriff also states that she said to him, after the levy, that the property levied upon belonged to Bentley. The jury evidently believed her version of the transactions.

A majority of my associates think the judgment should be reversed on the ground that the verdict is clearly against the weight and reasonableness of the evidence, and I defer with hesitation to their views. Their reasoning is as follows: "It is unreasonable to think that the sheriff's office would have levied upon this property under the circumstances testified to by plaintiff and her witnesses. Sheriff Hoagland himself testified that he knew the parties and wanted to be careful in the levying; that

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he asked Mrs. Bentley (plaintiff) to whom the property levied on by Mr. Zellars belonged, and she said it belonged to Bentley. The plaintiff told him that Burr & Marlay were willing that she should use the machine, but he told her he would not consent to that; that in the same conversation she stated to him that Bentley deposited the money in the bank in her name and she drew her check for it, but that it was Bentley's money and the machine belonged to him; that he believed and relied upon the representations made by her and would not otherwise have proceeded with the levy and sale.

"It is significant that plaintiff talks all the time about money which she had in the bank, but nowhere in either abstract is it shown how she ever obtained any of the money, except the one statement in her own abstract 'that before that time she worked at the detective business in Mr. Bentley's office and got half the income.' The testimony of Sheriff Hoagland is that she told him, the day after the levy was made, 'that Bentley deposited the money in the bank in her name and she drew her check for it, but it was Bentley's money, and the machine belonged to him.' She denies that she told Sheriff Hoagland that the machine belonged to Bentley, but she does not deny telling him that the money deposited in her name was Bentley's money.

"There is another theory upon which the judgment in this case should be reversed. Conceding that the testimony might be sufficient to take the case to the jury if the action were one against Burr & Marlay for fraud in obtaining the execution of the agreement set out in the abstract, it does not follow that that evidence is sufficient to take the case to the jury in this action against the sheriff for an unlawful levy upon and sale of her property as that of her husband. This is an action against the sheriff alone for damages by reason of the unlawful taking and retention of her property. The defense pleaded by the sheriff is estoppel, the grounds upon which the estoppel is based being that she directed the officer to

levy upon the automobile, at the time stating that it was Bentley's property. Upon this point plaintiff's testimony denying these allegations stands alone, entirely uncorroborated, while against it is the testimony of the deputy sheriff, Zellars, that she did give such direction and make such statement, corroborated by Mr. Marlay, who was present at the time, and further corroborated by Sheriff Hoagland himself, who testified that on the next day she told him the same thing. The question, then, so far as this action is concerned, is: Can we permit a verdict of a jury to stand upon the uncorroborated testimony of this plaintiff as against the sheriff and his deputy and a reputable attorney, Mr. Marlay, who testified positively and unequivocally upon that point?"

There is much weight in this argument. The judgment of the district court is therefore

REVERSED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

STATE, EX REL. PAUL S. TOPPING, APPELLEE, v. JAMES D.
HOUSTON ET AL., APPELLANTS.

FILED OCTOBER 17, 1913. No. 18,157.

1. **Courts: SPECIAL TRIBUNALS: FINDINGS: CONCLUSIVENESS.** Where a special tribunal is created by a statute to ascertain and declare the existence or nonexistence of certain facts, and no provision is made for an appeal or review thereof by the courts, the action of the tribunal, in the absence of fraud or mistake, is final.
2. **Municipal Corporations: RECALL OF OFFICERS: PETITION: REVIEW.** Under section 36, art. III, ch. 14a, Comp. St. 1911, containing the provisions for the recall of municipal officers in cities which have adopted the commission form of government, the city clerk is required to ascertain and declare whether the requisite number of qualified signers have signed the petition for a recall election, and, in the absence of fraud or mistake, his determination thereof is not subject to review.

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3. ———: ———: ———: DUTY OF COUNCIL. If no fraud or mistake appears, and the petition is regular in form and is accompanied by the proper certificate of the city clerk, the city council must proceed under the statute to convene and fix a date for the election.
4. **Officers: ABOLITION OF OFFICE: POWER OF LEGISLATURE.** An office created by the legislature may, in the absence of any constitutional restrictions, be abolished by that body, and the incumbent of such office has no property interest in it of which he may not be deprived.
5. ———: TERM OF OFFICE: POWER OF LEGISLATURE. In the creation of an office by the legislature, it may impose such limitations and conditions as to its continuance and termination as it sees fit, and in such a case the incumbent takes the office subject to the conditions imposed.
6. **Municipal Corporations: REMOVAL OF OFFICERS: NATURE OF POWER.** The power granted to electors of a city to remove certain public officers is political in its nature, and is not the exercise of any judicial function.
7. ———: RECALL OF OFFICERS: PETITION: SUFFICIENCY. The provision of the statute that a recall petition "shall contain a general statement of the grounds upon which the removal is sought" does not require the petition to contain specific charges of misconduct such as would be required in a judicial inquiry, but its purpose is to furnish information to the electors upon which a political and not a legal issue may be raised at the election.

APPEAL from the district court for Otoe county:
HARVEY D. TRAVIS, JUDGE. *Affirmed.*

Andrew P. Moran and John C. Watson, for appellants.

O. G. Leidigh and Paul S. Topping, contra.

LETTON, J.

This is an appeal from the allowance of a peremptory writ of mandamus commanding the respondents James D. Houston, James A. Richardson, and Robert E. Hawley, members of the city council of Nebraska City, to convene as such city council within ten days and to order an election to be held on a date then fixed for "the purpose of submitting to the electors of said city the proposition of

recalling and removing said James D. Houston, present mayor and member of the council of said city, and electing as his successor thereto at such election Paul S. Topping, a legal voter of said city."

In January, 1912, the city of Nebraska City adopted the commission plan of government. The respondents were in April of that year elected as mayor and councilmen, respectively, their terms of office expiring April, 1914. On the 10th day of May, 1913, there was filed with the city clerk of Nebraska City a petition for the recall of Mr. Houston. The city clerk, as provided by the statute, made an examination of the names signed to the petition and certified that he had "carefully examined the names signed to the attached petition, being a petition for the recall of Mayor Houston, enough of them being legal voters equal to 30 per cent. of the highest vote cast at the general election of Nebraska City, held the 2d day of April, 1912." The city council refused to call the election, for the reasons that the petition for the recall and the certificate of the city clerk thereto were not sufficient. Whereupon relator brought this action praying for a writ of mandamus. Objection was made to the issuance of the writ by Andrew P. Moran as *amicus curiæ*, which was overruled. A demurrer was then filed, which was also overruled. Afterwards an amended answer was filed, upon which the case was tried, and after a hearing the writ was allowed to issue.

The respondents make eight assignments of error: First, that the court erred in not sustaining the objections; second, that it erred in not sustaining the demurrer; the third and remaining assignments may be grouped, and in substance amount to the complaint that the court erred in finding the issues as it did and granting the peremptory writ. Applying the rule that this court will ordinarily consider only the points argued, we omit reference to several of the errors assigned.

There are really only two points presented for our consideration: First, did the petition contain the requisite

number of names? and, second, did it contain a general statement of the grounds upon which the removal is sought? If the number of qualified signers required by the statute appended their names thereto, and if it contained a general statement of the grounds upon which the removal is sought, the city council had no discretion in the premises, but it became its duty under the provisions of the statute to call an election within the time specified in the statute.

The inquiry as to whether the petition contains a sufficient number of names must be determined by the language of the statute. Section 36, art. III, ch. 14a, Comp. St. 1911, provides: "The procedure to accomplish the removal of any incumbent of such office shall be as follows: A petition signed by such electors equal in number to at least thirty per centum of the highest vote cast at the last preceding general city election, demanding an election of a successor to the person sought to be removed and naming the candidate or candidates proposed for election to succeed him, shall be filed with the city clerk, which petition shall contain a general statement of the grounds upon which the removal is sought. Within ten days from the date of filing such petition, the city clerk shall examine it and from the voters' register, if the petition be filed in any city where registration laws are in force, or, if not, then from such source as may be available to such clerk, ascertain whether or not said petition is signed by the requisite number of qualified electors, and, if necessary, the council shall allow such clerk extra help for that purpose, and the clerk shall attach to said petition his certificate showing the result of such examination, and if the clerk's certificate to such petition shows that it is insufficient in point of numbers signed, it may be amended within ten days from the date of such clerk's certificate by the filing of a supplemental petition signed and sworn to as in the case of the original petition, and the clerk shall, within ten days after such supplemental petition be filed, make a like examination of the supple-

mental petition, and if the certificate shall show the supplemental petition, together with the original petition, to contain the requisite number of signatures, the clerk shall submit such original petition, and supplement, together with his certificates, without delay, to the council, and the council shall order and fix, without delay, a date for holding an election, which date shall not be less than thirty nor more than sixty days from the date of the clerk's certificate to the council showing the petition sufficient."

By these provisions the clerk is made the custodian of the authority to determine the sufficiency of the petition. The general rule is that, where any officer or board is vested with authority to determine a question concerned with the administration of his or its duties, his or its decision, if made in good faith, is decisive of the point, in the absence of fraud or mistake. *Smiley v. Sampson*, 1 Neb. 56; *Tyson v. Washington County*, 78 Neb. 211. We have so held with relation to the action of the board of county commissioners in a number of matters where the statute makes that the deciding body. *Dodge County v. Acom*, 61 Neb. 376; *Andrews v. Lillian Irrigation District*, 66 Neb. 461; *Campbell v. Youngson*, 80 Neb. 322; *Lancaster County v. Lincoln Auditorium Ass'n*, 87 Neb. 87. And we see no reason why the same doctrine does not apply with regard to the action of a city clerk in determining the sufficiency of such a petition. This seems to be the view taken respecting like provisions in other recall statutes. *Good v. Common Council*, 5 Cal. App. 265; *Locher v. Walsh*, 17 Cal. App. 727; *Davenport v. City of Los Angeles*, 146 Cal. 508.

In the present case the city clerk was examined and cross-examined as to his method of ascertaining that the persons signing the petition were qualified electors of the city. Objections were made to some of the questions propounded upon cross-examination, which under the state of the pleadings we think were rightly sustained. There is neither pleading nor proof that any persons

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whose names are signed to the petition were not qualified electors or that any fraud had been perpetrated or mistake made by the city clerk in making his determination. There can be no question but that when the petition was presented with the clerk's certificate attached, showing that it had been signed by the requisite number of qualified electors, and no fraud, bad faith or mistake appeared, it was the duty of the city council to call the election; provided, of course, that the petition was sufficient in other respects.

This brings us to the second point in the case. The statute requires that the petition "shall contain a general statement of the grounds upon which the removal is sought." The grounds stated in the petition are: "Said Houston, in attempting to discharge the duties and trusts of said office, is grossly extravagant with the public funds of said city; manifestly partial, prejudicial and malevolent in exercising the prerogatives of said office; and because of his nonfeasance and malexecution of the duties of said office; and because of his obvious incompatibility of temperament to discharge the duties of said office economically and to the best interest of the citizens and taxpayers of said city of Nebraska City." The respondents assert that the petition fails to give a general statement of the grounds, as the statute requires, upon which the removal is sought, but only states conclusions of law. As to the first ground alleged, it is said that it was impossible that the mayor could spend money extravagantly in his individual capacity; that appropriations can only be made by a majority of the council; that some other member must have voted with him in order to permit the careless and extravagant expenditure of money; and that as a natural consequence the petition in this respect did not set forth sufficient grounds for recall.

As to the other grounds set forth, it is said that they merely state conclusions of law, and that the relator should be held to a strict compliance with the rules of pleading because he is attempting to remove and recall

a duly elected officer of a municipality and place himself in that office for the unexpired term, and, also, that the charges in the latter portion of the statement are "absolutely meaningless." It is further argued that a recall does not constitute due process of law, since "it condemns without hearing, proceeds without inquiry, and renders judgment without trial," and that, since a bill of attainder is defined as a legislative act which inflicts punishment without judicial trial, the act of recall, whether it emanates from the organic or the statute law, is neither more nor less than a bill of attainder, and therefore violates both the constitution of the United States and the constitution of the state of Nebraska, and that the provisions for the initiative, referendum and recall violate that part of the constitution of the United States which guarantees every state in the Union a republican form of government.

These contentions raise the question as to the intention of the lawmakers when they required "a general statement of the grounds upon which the removal is sought." Was it their intention that the election should be of the nature of a trial or hearing, for which sufficient charges must be preferred showing cause why the officer should be removed, and as to which petition the usual rules with respect to specific charges, applied in impeachment or other proceedings to remove officers for cause, should apply, as respondents contend, or was the object of the statute to make the officer liable to be removed and his term of office determined by the electors at any time when the required majority, proceeding under the statute, should believe that it was detrimental to the best interests of the city to continue him in office until the end of the term for which he was elected?

We find it unnecessary to consider respondents' argument that the provisions for the initiative and referendum are violative of the constitution of the United States. It may be said in passing, however, that in *Kiernan v. Portland*, 57 Or. 454, the supreme court of Oregon took the

contrary view, and that in the *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U. S. 118, 32 Sup. Ct. Rep. 224, it was expressly decided by the supreme court of the United States that whether or not a state has ceased to be republican in form, within the meaning of the guarantee in the constitution of the United States (article IV, sec. 4), because of its adoption of the initiative and referendum is a political and governmental question which is solely for congress to determine. Is the exercise of the power of recall by the electors a judicial act or is it legislative in character? Some of our former decisions throw light upon this question. We have held a number of times that an office created by the legislature may be abolished by that body, and that the incumbent of such an office has no property interest in it the deprivation of which is prohibited by the constitution. *Douglas County v. Timme*, 32 Neb. 272; *State v. Stewart*, 52 Neb. 243; *Dinsmore v. State*, 61 Neb. 418. And, also, that when the power has been given the governor to remove certain public officers that power is administrative in its nature, and not a judicial function, and an order made in the proper exercise of the authority will not be reviewed by the courts. *State v. Hay*, 45 Neb. 321.

In *State v. Somers*, 35 Neb. 322, it appeared that the charter of the city of Omaha gave the mayor power to appoint a commissioner of health, and provided, further: "All officers appointed by the mayor and confirmed by the council shall hold the office to which they may be appointed until the end of the mayor's term of office, and until their successors are appointed and qualified, unless sooner removed." It was held: "Where the statute authorizing the appointment contains a reservation of the right of removal without preferring charges, and this power is exercised by the removal of the incumbent and the appointment of another in his stead, the right of the former to the office will cease." The court also said: "Where a person is appointed to an office for a definite period and there is a provision that to obtain his removal

charges must be preferred against him, he cannot be removed unless such charges are made; but this rule does not apply to a case where the power of removal is retained and no charges are required."

In a case arising in California (*In re Carter*, 141 Cal. 316) the facts were that the mayor of San Diego removed the fire commissioner of the city, under a charter provision giving the mayor power to remove any person appointed by him by the giving of notice to the person removed, and stating the cause; and it was held that the officer had no property right in the office, and that "in creating an office the government can impose such limitations and conditions with respect to its duration and termination as may be deemed best, and that in such a case the incumbent takes the office subject to the conditions which accompany it." It was also held that proceedings under such a statute were not of a judicial character. A large number of cases are cited in the opinion. See, also, *Mial v. Ellington*, 134 N. Car. 131, 65 L. R. A. 697, and cases cited in the opinion and note.

The process of removal under the recall statutes did not originate in this state, and the legislature no doubt had in mind the development of the recall idea, and the decisions that had been made in other states upon substantially similar statutes. A few cases from other states will be examined.

Hilzinger v. Gillman, 56 Wash. 228, was an action to enjoin the city clerk from certifying to the city council that a certain recall petition was sufficient and in conformity with the provisions of the charter. A demurrer to the petition was sustained, the action dismissed, and an appeal taken from such judgment. The court said, speaking of section 281 of the charter, which is substantially identical with the Nebraska statute: "Section 281 contemplates a recall of the officer at any time that his official conduct is not responsive to the wish or will of a majority of the electors in his precinct or ward. Whilst this section provides that the reason for the recall shall be stated in the petition,

the charter does not provide that any specific reason shall be necessary or controlling. The whole scheme or system of the charter makes it apparent that the right of recall of elective officers was reserved to the people, to be exercised at any time the public interest was thought to require it. * * * His successor is elected and inducted into office under the recall provision only upon the failure of the incumbent to secure an indorsement of his stewardship by a majority of the electorate. Like the British ministry, an elective officer under the charter is at all times answerable to the people for a failure to meet their approval on measures of public policy."

In *Conn v. City Council*, 17 Cal. App. 705, the petition for recall alleged, "that the six councilmen sought to be removed had been guilty of (1) malfeasance in office; (2) that they had been parties to a political agreement by which the office of city engineer was traded in consideration of other appointments; (3) that such political trafficking was contrary to the spirit of the charter and detrimental to the public interest; (4) that the councilmen had united in denying the petition of a majority of qualified electors in matters of public policy;" and, finally, that the signers of the petition for the recall no longer desire the services of these particular councilmen. The statute required that the petition shall contain "a general statement of the grounds for which the removal is sought." Substantially the same argument as to defective statement of cause was made as in this case, but the court said: "It is a mistaken theory of counsel for the defendant that the charter provisions of the city of Richmond contemplate and require that a recall petition should be drawn with a due regard for the technical niceties and refinements of the rules of law which pertain to the preparation of pleadings in civil and criminal cases;" and, further: "Manifestly, the purpose of the charter in providing for a recall election is to give the people of the municipality the right to cut short the official term of every elective officer whose conduct in office is for any cause unsatisfactory or

distasteful to the body of the community. * * * The petitioners are only required to state generally their grounds or reasons for demanding the removal of the obnoxious officer, for the obvious and only purpose, it seems to us, of furnishing information to the people of the community upon which a political issue rather than an issue at law may be raised and determined."

It has been argued that absurd reasons may be stated in the petition, and that an officer may be called upon to defend his position against frivolous attacks. Doubtless the provision requiring 30 per cent. of the electors to sign the petition before the council are compelled to act was designed to avoid such a contingency. The legislature apparently assumed that nearly one-third of the electorate would not entail upon the taxpayers the cost of an election, unless the charges made approved themselves to their understanding and they were seriously dissatisfied with the services of the incumbent of the office.

The idea of removing public officers at the discretion of the appointing power, as we have seen, is not a novel one. The concept that this may be done at the direct instance and upon the motion of the electors, the ultimate source of power in a republic, only carries back the power of removal one step farther. If it is not obnoxious to the constitution to allow an elected officer to remove an appointed one, how can it be a violation of that law to allow it to be done by the people themselves. They are no doubt better qualified to determine the capability and efficiency of their administrative agent after giving him an opportunity to perform the duties of the office than they were when they first selected him to fill the position. The officer takes the position for a fixed term, with the condition attached that he is subject to removal whenever his services are not desired by the number of his fellow citizens named in the statute. The policy of the recall may be wise or it may be vicious in its results. We express no opinion as to its wisdom with respect to the removal of administrative officers. If the people of the state find, after a trial of the

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experiment, that the provisions of the statute lead to capable officials being vexed with petitions for their recall, based upon mere insinuations or upon frivolous grounds, or because they are performing their duty and enforcing the law, as they are bound to do by their oath of office, or lead without good and sufficient reason to frequent, costly, and unnecessary elections, they have the power through their legislature to amend the statute so as to protect honest and courageous officials. This may be done by increasing the number of names required to be signed to the election petition or by requiring specific charges of misconduct to be made therein, and thus allowing the officer attacked to meet the charges made or by adding both of these provisions to the recall feature of the law. Accusations of wrongful acts attributed to an officer merely by innuendo or by vague generalities, as may now be done, are often the most difficult to refute by proof and the hardest to meet by argument. Whether the best public policy is subserved by the statute in its present form is for the legislature to consider, and not for the court, which must declare the law as it finds it.

We find no error in the record, and the judgment of the district court is

AFFIRMED.

ELLA KELLEY, EXECUTRIX, APPELLANT, v. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE.

FILED OCTOBER 17, 1913. No. 17,360.

Master and Servant: INJURY TO SERVANT: NEGLIGENCE: DIRECTING VERDICT. Where actionable negligence is not shown by the evidence, in a suit against an employer for negligence causing the death of an employee, the trial court should direct a verdict in favor of defendant.

APPEAL from the district court for Douglas county:
WILLIAM A. REDICK, JUDGE. *Affirmed*.

Charles Battelle and Joseph Carr, for appellant.

John L. Webster and W. J. Connell, contra.

ROSE, J.

While George E. Bradford was in the employ of defendant at the intersection of Twenty-second and Nicholas streets in Omaha, he was fatally crushed between an electric motor car and a freight car on defendant's street railway. To recover resulting damages in the sum of \$7,500, this action was brought by the executrix of his will. In the petition it is alleged that Bradford, immediately prior to the accident, had, as an employee of defendant, been cutting grass and weeds; that he was called therefrom by defendant, and under its direction was handling a trolley rope of the electric motor car; that while so engaged he was ordered by defendant's foreman to place a timber between the cars for switching purposes, and to get between them and hold it in place while the switching was being done; that the timber was one of the cast-off and discarded cross-arms upon which electric, telephone and telegraph wires are usually supported, and was unsound and insufficient in strength, and an improper and unsafe tool for the work thus ordered to be done; that when complying with the foreman's directions the timber broke; that the cars collided; and that Bradford was injured in the manner stated. The specific acts of negligence are charged in these words: "The said death of Bradford was caused by the negligence and carelessness of said defendant in providing him, the plaintiff, with unsafe, unsound, weak and an improper timber to be used as aforesaid, and ordering and directing him to use the same as aforesaid." The answer was a general denial. For the reason the trial court was of opinion that plaintiff "failed by her proof to show any negligence on the part of the defendant which entitled her to a verdict," there was a peremptory instruction against her. From a dismissal of her action, she has appealed.

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Plaintiff takes the position that defendant was guilty of two negligent acts: (1) In ordering Bradford to use an unsafe and unsuitable cross-arm, the foreman violated the law requiring a master to furnish his servants with reasonably safe appliances for the work in hand; (2) in calling the servant from safe employment and in ordering him into a dangerous place, in which he was without experience or knowledge, where he was required to act without time for reflection, defendant violated the rule that the master may be chargeable with negligence for giving such a command, though the servant may not be negligent in obeying it, the danger not being so obvious that a prudent man, under the circumstances, would disobey his employer. Among the cases cited to sustain the position thus taken is *Alabama Steel & Wire Co. v. Tallant*, 165 Ala. 521. It is contended that the questions of negligence were for the jury.

For proof of the facts constituting the alleged negligence, plaintiff relies on two witnesses. One was the plaintiff herself, who said she witnessed the accident from her porch. In several particulars her testimony is contradictory. The other witness was an employee of defendant, by the name of Sam Musca, who required the assistance of an interpreter. His testimony is somewhat confusing and not entirely consistent. Defendant, with a motor car, was engaged in switching a freight car on its track around a curve. On account of the curve, ordinary couplings could not be used, and a number of wooden cross-arms had been provided for switching purposes. Bradford was watching the trolley rope, or attending to other duties incident to switching. He picked up one of the cross-arms, placed it lengthwise between the motor and the freight car and stepped away. For some reason, it was not kept in place by impact, and it fell. Bradford went back between the cars, picked it up, and reset it. When the motor closed on it, he attempted to hold it in place, but it slipped at one end, and he was crushed between the cars. Plaintiff testified that the cross-arm was

allowed to remain for two or three days near the place of the accident, that she saw it afterward, and that she thought it was broken in the middle. Plaintiff's other witness, who saw what occurred, stated, however, that a sliver had been split off one end of the cross-arm by the impact and that the body of the timber had not been broken. This fact was fairly established by plaintiff, though she said she thought the stick was broken when she saw it after the accident. The evidence fails to show that the cross-arm was unsound or unfit for the work in hand, or that it would not have answered the purpose for which it was used, had it been properly adjusted. The evidence as a whole, which has all been read as given by the witnesses, does not seem to show that the trial court erred on this issue in directing a verdict for defendant.

Was a negligent order of the foreman the proximate cause of the injury? Plaintiff testified in substance that she heard the foreman ordering Bradford to get a cross-arm, to go between the cars, and to put it in place. On the contrary, plaintiff's witness Musca stated positively that the order was given to him, and not to Bradford; that Bradford voluntarily got the cross-arm and attempted to use it; that after he had adjusted it the second time he was peremptorily ordered by both the foreman and the motorman "to get out of there," but that, instead of obeying, he attempted to hold the timber in place. The evidence that these orders "to get out of there" were given to Bradford is uncontradicted. If plaintiff is correct in her propositions of law therefore, evidence of defendant's actionable negligence seems to be wanting. The conclusion is that error does not affirmatively appear in the peremptory instruction in favor of defendant.

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

LE ROY HALL ET AL., APPELLANTS, V. CRAWFORD COMPANY
ET AL., APPELLEES.

FILED OCTOBER 17, 1913. No. 17,286.

Eminent Domain: INJURY TO PROPERTY: REMEDY OF OWNER. An owner of property, who knowingly permits a corporation, having the power of condemnation for a public purpose, to use or damage such property therefor, may be limited to his remedy for damages.

APPEAL from the district court for Dawes county:
WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Allen G. Fisher and William P. Rooney, for appellants.

Albert W. Crites and J. W. Hartwell, contra.

ROSE, J.

This is an application for an injunction to prevent defendants from diverting water from the White river above the city of Crawford, Dawes county. The original petition was filed by Le Roy Hall March 2, 1897. Below Crawford he had built a dam across the stream and had used the water-power to operate a mill. As a riparian proprietor he asserted rights superior to the claims of defendants. The Crawford Company, defendant, was seeking a franchise to supply the municipality and its inhabitants with water, and for that purpose had constructed a dam across the same stream above the town. Crawford, though now a city, was then a village. It is one of the defendants. On plaintiff's petition the village was temporarily enjoined from granting to the Crawford Company a franchise for the purpose stated. For 14 years there was no attempt on the part of plaintiff to prosecute his suit to final decree. In the meantime he and the Crawford Company were parties to another suit involving the waters of the White river. *Crawford Co, v. Hathaway,*

67 Neb. 325. In the present case Samuel Swinbank, Peter L. Raben, Emil Raben and Fred Macumber, claiming to be plaintiff's successors in interest, filed an amended and supplemental petition July 7, 1911, praying that judgment be rendered in their favor for damages in the sum of \$12,000; that for their protection the preliminary injunction which had been granted in favor of plaintiff and against the village of Crawford, March 3, 1897, be extended to the city of Crawford, and that its officers be enjoined from diverting water from the White river. To this amended and supplemental petition defendants filed answers. Upon a trial of the issues joined, the court below dismissed the action. The last named petitioners have appealed.

Did the trial court err in denying the relief sought? Without reference to the evidence, the amended and supplemental petition shows on its face that as early as July 10, 1907, the city made use of the waters of the White river for municipal purposes. It still continues to do so. Hall and his successors had knowledge of the facts. They knew of the improvements which the village and the city necessarily made before taking water from the White river for the benefit of the municipality and the inhabitants thereof. Hall's petition alleged that the Crawford Company had diverted water from the river above the village before August 7, 1895. The village and the city had power to condemn property rights necessary to a public water system and to grant to a corporation a franchise to supply the city and its inhabitants with water. Comp. St. 1895, ch. 14, art. I, sec. 69, subd. 15. For many years Hall and his successors in interest, with knowledge of the facts, but without any effort to adjudicate in this suit the rights they now assert, permitted the municipality to expend public funds in diverting and in distributing water from the White river for public purposes. The dismissal of the case, therefore, was proper, under the principle of law that an owner of property, who knowingly permits a corporation, having the power of condemnation for a

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public purpose, to use or damage such property therefor, may be limited to his remedy for damages.

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

**WILLIAM D. ARMSTRONG, APPELLANT, v. JAMES M. BATES,
APPELLEE.**

FILED OCTOBER 17, 1913. No. 17,334.

1. **Statutes: CONSTITUTIONALITY: APPEAL: BRIEFS.** An attack on the constitutionality of an act of the legislature may be disregarded on appeal, where the particular in which the lawmakers disregarded the constitution and the section violated are not pointed out in appellant's brief.
2. **Taxation: FORECLOSURE OF LIEN: PETITION: DESCRIPTION.** In a petition against a nonresident defendant to foreclose tax liens, a description of two 40-acre tracts as "NW' SE' and SW' NE" held sufficient as against a collateral attack, where the state, range, county, township and section were definitely stated.
3. **Process: CONSTRUCTIVE SERVICE: AFFIDAVIT.** The purpose of an affidavit for publication of notice to a nonresident defendant is to enable the court to determine whether the action is one in which jurisdiction may be acquired by such notice.
4. **——: ——: NOTICE.** Notice to a nonresident defendant, inserted in a weekly newspaper for four consecutive weeks, beginning February 8, 1900, and ending March 1, 1900, is a sufficient publication within the meaning of section 79 of the code, providing that "the publication must be made four consecutive weeks in some newspaper."

**APPEAL from the district court for Keya Paha county:
JAMES J. HARRINGTON, JUDGE. *Affirmed.***

Andrew M. Morrissey, Allen G. Fisher and William P. Rooney, for appellant.

Lear & Lear, contra.

ROSE, J.

This is a suit to redeem 80 acres of land in Keya Paha county from a tax foreclosure sale and to quiet title in plaintiff. Elizabeth Van Ingen was the holder of the record title February 3, 1900, and for "one dollar and other valuable considerations" deeded the land on June 2, 1908, to Charles P. Bresee, who for a like consideration made a similar conveyance to plaintiff, January 15, 1909. Since September 21, 1900, defendant has been in possession under a sheriff's deed executed in the tax foreclosure case, an action instituted by Keya Paha county against Elizabeth Van Ingen, February 3, 1900. Plaintiff pleads title in himself and the invalidity of the foreclosure under which defendant holds possession. From a judgment denying plaintiff relief and quieting title in defendant, plaintiff appeals.

Plaintiff asserts that the district court was without jurisdiction to entertain the foreclosure suit, because there was no valid statute authorizing such a proceeding, the act under which Keya Paha county proceeded never having been legally enacted. Laws 1881, ch. 75; Comp. St. 1901, ch. 77, art. IV. The particular in which the lawmakers disregarded the constitution and the section violated are not pointed out in appellant's brief. The constitutional question may therefore be disregarded. *Boyes v. Summers*, 46 Neb. 308.

Failure to describe in the petition for foreclosure the two 40-acre tracts in controversy is urged as a ground for declaring the tax deed void. Following the name of the county and of the state, the description is: "The NW⁴ SE⁴ and SW⁴ NE⁴ of section 1, in township 32 north of range 22 west of the sixth principal meridian." The state, range, county, township and section are definitely stated. The only question then is: Are the two particular 40-acre tracts in the section mentioned sufficiently described? Does the following designation meet the requirements of the law: "NW⁴ SE⁴ and SW⁴ NE⁴"? In

this state the abbreviation "4" as thus used, or " $\frac{1}{4}$," is understood by taxing officers, by county treasurer and by tax-debtors generally to mean "quarter." The meaning of that abbreviation was made clear in the published notice in which the land was described as "Northwest quarter (nw $\frac{1}{4}$) of the southeast quarter (se $\frac{1}{4}$) and the southwest quarter (sw $\frac{1}{4}$) of the northeast quarter (ne $\frac{1}{4}$).". The other abbreviations used are also well understood. In a collateral attack on the decree the description will be held sufficient.

There is also an attack on the sufficiency of the affidavit for constructive service in the foreclosure suit. There appear to be two propositions under this head: The nature of the cause of action was not stated, and it was not shown that defendant was absent from the state. The purpose of such an affidavit has been stated as follows: "An affidavit for service by publication is not for the information of the party to be served, but to enable the court to determine whether the action is one in which jurisdiction may be acquired by such service." *Leigh v. Green*, 62 Neb. 344. The affidavit in the present case was made by the county attorney. It contains the names of the parties to the suit and states that a petition to foreclose tax liens against defendant has been filed in the district court. It describes the land on which the taxes are liens and states the amount thereof. It states that the petition contains a prayer that the land described may be decreed to be sold to satisfy such liens. It also contains the following statement: "All of the said defendants are nonresidents of the state of Nebraska and service of summons cannot be made within the state of Nebraska upon either or any of said defendants." Both attacks are unavailing, when the contents and purpose of the affidavit are considered.

Another assignment of error is that the notice of publication was insufficient to comply with section 79 of the code, which provides: "The publication must be made four consecutive weeks in some newspaper." The publisher of the weekly newspaper in which the notice was

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inserted made affidavit that it was published "for four consecutive publications, the first publication having been made on the 8th day of February, 1900, and the last on the 1st day of March, 1900." There being nothing in the record to disprove this statement, the publication was sufficient under former holdings. *Burr v. Finch*, 91 Neb. 417. No error having been found, the judgment is

AFFIRMED. .

REESE, C. J., LETTON and FAWCETT, JJ., not sitting.

PHILIP MENSINGER, APPELLANT, v. AINSWORTH LIGHT &
POWER COMPANY, APPELLEE.

FILED OCTOBER 17, 1913. No. 17,346.

1. **Appeal: CONFLICTING EVIDENCE.** In an action at law for damages, a controverted issue of fact is a question for the jury, and, when they pass on evidence which is substantially conflicting, their finding in that respect will not be set aside on appeal unless clearly wrong.
2. ———: **BRIEFS.** On appeal, an assignment that there was error in admitting evidence may be disregarded, where appellant in his brief fails to point out the pages in the abstract or bill of exceptions where the challenged ruling may be found.
3. **Harmless error in instructions** is not a ground for reversing a judgment.

APPEAL from the district court for Brown county:
JAMES J. HARRINGTON, JUDGE. *Affirmed.*

Weaver & Giller and J. A. Douglas, for appellant.

A. W. Scattergood, contra.

ROSE, J.

This is an action to recover damages in the sum of \$1,950 for breach of a written contract obligating plaintiff

to furnish meals for each of defendant's employees at the rate of \$4 a week. Defendant's workmen were employed to construct a dam at Plum Creek, northwest of Ainsworth, and the contract for their meals covered the entire period of construction. Plaintiff agreed "to furnish all necessary provisions and all necessary help and to furnish three good, substantial meals each day in the mess room." When the contract was partially performed, defendant terminated it without the consent of plaintiff, and the damages sought are the profits of full performance. The substance of the defense pleaded is that plaintiff failed and refused to furnish good, substantial meals for defendant's workmen, but, in violation of his contract, furnished uneatable, spoiled, soured and worthless food, and thus compelled defendant to cancel the contract and thereafter to run its own boarding-house. From judgment on a verdict in favor of defendant, plaintiff has appealed.

The first assignment of error will be disregarded, because it relates to the admission of evidence, and plaintiff in his brief has not pointed out the pages of the abstract or bill of exceptions, where the challenged ruling may be found. *Whitney v. Broeder, ante*, p. 305.

The next point is that the evidence is insufficient to sustain the verdict. There is sufficient competent testimony, if believed by the jury, to support a finding that plaintiff did not furnish the kind of meals required by his contract and to justify a rescission by defendant for that reason. On this issue the evidence was substantially conflicting. The question was therefore one of fact for the jury, and their verdict, not clearly appearing to be wrong, settles it in favor of defendant.

The final argument is directed to a criticism of two instructions on the ground that they do not correctly state the measure of plaintiff's damages. The verdict in favor of defendant was necessarily a finding that plaintiff did not comply with his agreement to furnish good, substantial meals and that he was not entitled to a recovery. The jury, therefore, never reached the question as to the meas-

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ure of damages. It follows that plaintiff was not prejudiced by the instructions on that subject, and that they do not require a reversal, even if they are erroneous, a question not decided.

AFFIRMED.

REESE, C. J., LETTON and FAWCETT, JJ., not sitting.

WILLIAM A. MYERS, APPELLEE, v. JOHANNES PERSSON,
APPELLANT.

FILED OCTOBER 17, 1913. No. 17,349.

Evidence: PAROL EVIDENCE: AMBIGUITY. Ambiguity in a written instrument may be explained by oral testimony showing the mutual understanding of the parties.

APPEAL from the district court for Nuckolls county:
LESLIE G. HURD, JUDGE. *Affirmed.*

Tibbets, Anderson & Baylor, for appellant.

H. H. Mauck, contra.

ROSE, J. .

The relief sought is the specific performance of a contract to exchange real estate. William A. Myers, plaintiff, and Cassen Cassens each separately contracted with the state to purchase a 40-acre tract of school land in Nuckolls county for \$8 an acre, the appraised value. Both tracts were crossed diagonally by the Missouri Pacific railway. Nineteen acres of the land purchased by Cassens were east of the railroad and four acres of the tract purchased by Myers were west of the railroad. These fractional parts the purchasers agreed to exchange, though they did not at the time have title. Their writings are in form as follows: "I hereby assign, and transfer unto William A. Myers all my right, title and interest in

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and to the east part of the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ east side the M. P. R. R. about 19 acres for the 4 acres west side the M. P. R. R. in the N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ sec. 16, town 1, range 7 west by paying me \$7.35 per year till we get clear title from the state and settle the different. Witness our hands this 30th day of April, 1891. C. Cassens. In Presence of Edwin J. Murfin." "I hereby assign, and transfer unto Cassen Cassens all my right, title, and interest in and to the west part of the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, sec. 16, T. 1, R. 7, about 6 acres west side the M. P. R. R. for the 19 acres east side the M. P. R. R. in S. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$, sec. 16, town 1, range seven west by paying him \$5.62 per year till we get clear title from the state and settle the different. Witness our hands this 30th day of April, 1891. W. A. Myers. C. Cassens. In presence of Edwin J. Murfin."

No point is made on an error in description or on the inconsistency in the amount of interest to be paid annually.

After execution of the instruments copied, each party thereto surrendered to the other possession of the exchanged land. Cassens died before acquiring title to the 40-acre tract purchased by him from the state, and his school-land contract was sold to defendant, Johannes Persson, with notice of Cassens' agreement with Myers. As Cassens' successor, Persson paid the state the remainder of the purchase price and procured a deed to the entire 40-acre tract. Plaintiff pleads that he has performed on his part or tendered performance of all of the terms of the exchange contract, and that, within the meaning of the term "settle the difference," he is entitled to a deed for the 19-acre tract east of the railroad, upon paying for 15 acres at the appraised value of \$8 an acre and conveying to defendant the four-acre tract west of the railroad. Defendant denied any obligation to make the exchange on a basis other than full value at the time of making transfers, though he admitted that after procuring title he offered to execute a deed and settle the difference on a valuation of \$40 an

acre. The trial court decreed specific performance and directed the parties to make the exchange on the basis of the appraised value of \$8 an acre. Defendant has appealed.

That defendant bought the school-land contract with notice of the exchange agreement is fairly established. Defendant repeatedly recognized the exchange contract by accepting interest according to its terms. There is some discussion of the question of estoppel, but the evidence is clear that plaintiff did nothing to prevent him from demanding performance.

The controlling question in the case is the meaning of the term "settle the difference," as used in the exchange contract. The trial court admitted testimony to show that the parties understood that settlement should be made on the basis of the appraised value of \$8 an acre. Defendant insists that there is no competent testimony of that nature; that recognized rules for construing contracts as written allow him full value, and that he should not be required to perform on any other terms. This position is obviously untenable. Without reference to extraneous matters, the words "settle the difference" do not disclose definitely what was in the minds of the contracting parties. It is elementary that ambiguity in a written instrument may be explained by oral testimony showing the mutual understanding of the parties. Proof of this nature was properly admitted, and it fairly shows that the parties intended to settle the difference on the basis of the purchase price of \$8 an acre, as fixed by their school-land contracts with the state. They apparently adopted that basis in agreeing on the amount of interest which plaintiff should pay annually. The oral testimony is consistent with the writings and justifies the decree for specific performance.

AFFIRMED.

REESE, C. J., LETTON and FAWCETT, JJ., not sitting.

first Tuesday of May, and first Tuesday in November, in each and every year during the said term to the said grantees, their heirs and assigns." The contract was entered into in 1888, and was to run 25 years.

Section 6 of the contract provided: "A sufficient tax, not exceeding seven mills on the dollar, shall be levied and collected annually upon all taxable property upon the assessment roll of said city, to meet the payments under this ordinance, when and as they shall respectively mature during the existence of any contract for hydrant rentals, and shall be levied and kept as a separate fund known as the 'water fund' and shall be irrevocably and exclusively devoted to the payment of hydrant rentals under this ordinance, and shall not be otherwise employed."

On April 1, 1904, the city acquired the water plant through a sale by the master in chancery in a suit pending in the United States circuit court for the district of Nebraska, and since that time has controlled and operated the same. Upon the trial of this case it was stipulated as follows:

"It is admitted that each and every year during the existence of the water-works company and while it maintained and operated the plant and until the sale to the city of Broken Bow, April 1st, 1904, there was levied annually by the proper authorities a tax of seven mills on the dollar assessed valuation, such levies being for and designated as hydrant rental, the same being levied for the purpose of paying hydrant rentals.

"It is stipulated, subject to such objections as may be interposed, that at the time of the acquisition of the Broken Bow water-works system by the defendant, the city of Broken Bow, there was on hand in said treasury in hydrant rental fund derived from the seven-mill levy which had been levied annually theretofore \$1,566.59, which fund or amount was retained and used by the city; that all other moneys realized from the seven-mill levy, from the beginning of the operation of the water-works plant until its acquisition as aforesaid by the defendant

city, had been collected and applied in satisfaction of the hydrant rentals due under the franchise contract entered into between the city and the water-works company."

It appears from the above stipulation of facts that the defendant city, at the time it acquired the water-works, had in its possession \$1,566.59, derived from the seven-mill levy which had been theretofore annually levied. There is no claim that this money has ever been paid over to plaintiff. Counsel for defendant undertakes to justify the city in holding this money by stating that "the deed from the master in chancery in the foreclosure sale under the order and decree of the court conveyed to the purchaser, not only the plant and system, but also 'all rights, interest, title, claim and demands of every name and nature which have in anywise come to the said Broken Bow Water-Works Company, or in anywise arisen under a certain ordinance of the city of Broken Bow, passed on the 23d day of April, 1888, and all debts, dues, rentals, claims and demands of every name and nature however, arising against the said city, whether such have heretofore accrued and are now existing, or may at any time hereafter accrue to said company.' The conveyance from the purchaser at foreclosure sale to the city contained likewise the same provisions as hereinbefore referred to." To our minds this is a very unsatisfactory pretext under which to claim the right to retain over \$1,500 which defendant admits was collected under the seven-mill levy, and which under its contract with the water company it agreed should be "levied and kept as a separate fund known as the 'water fund' and shall be irrevocably and exclusively devoted to the payment of hydrant rentals under this ordinance, and shall not be otherwise employed." Plaintiff had, with the full knowledge of the city, become the owner of the three judgments long prior to the commencement of the foreclosure proceedings in the federal court. He thereby became entitled to receive all hydrant rentals derived from the seven-mill levy. Such rentals, as soon as collected, became a trust fund to "be irrevocably and ex-

first Tuesday of May, and first Tuesday in November, in each and every year during the said term to the said grantees, their heirs and assigns." The contract was entered into in 1888, and was to run 25 years.

Section 6 of the contract provided: "A sufficient tax, not exceeding seven mills on the dollar, shall be levied and collected annually upon all taxable property upon the assessment roll of said city, to meet the payments under this ordinance, when and as they shall respectively mature during the existence of any contract for hydrant rentals, and shall be levied and kept as a separate fund known as the 'water fund' and shall be irrevocably and exclusively devoted to the payment of hydrant rentals under this ordinance, and shall not be otherwise employed."

On April 1, 1904, the city acquired the water plant through a sale by the master in chancery in a suit pending in the United States circuit court for the district of Nebraska, and since that time has controlled and operated the same. Upon the trial of this case it was stipulated as follows:

"It is admitted that each and every year during the existence of the water-works company and while it maintained and operated the plant and until the sale to the city of Broken Bow, April 1st, 1904, there was levied annually by the proper authorities a tax of seven mills on the dollar assessed valuation, such levies being for and designated as hydrant rental, the same being levied for the purpose of paying hydrant rentals.

"It is stipulated, subject to such objections as may be interposed, that at the time of the acquisition of the Broken Bow water-works system by the defendant, the city of Broken Bow, there was on hand in said treasury in hydrant rental fund derived from the seven-mill levy which had been levied annually theretofore \$1,566.59, which fund or amount was retained and used by the city; that all other moneys realized from the seven-mill levy, from the beginning of the operation of the water-works plant until its acquisition as aforesaid by the defendant

city, had been collected and applied in satisfaction of the hydrant rentals due under the franchise contract entered into between the city and the water-works company."

It appears from the above stipulation of facts that the defendant city, at the time it acquired the water-works, had in its possession \$1,566.59, derived from the seven-mill levy which had been theretofore annually levied. There is no claim that this money has ever been paid over to plaintiff. Counsel for defendant undertakes to justify the city in holding this money by stating that "the deed from the master in chancery in the foreclosure sale under the order and decree of the court conveyed to the purchaser, not only the plant and system, but also 'all rights, interest, title, claim and demands of every name and nature which have in anywise come to the said Broken Bow Water-Works Company, or in anywise arisen under a certain ordinance of the city of Broken Bow, passed on the 23d day of April, 1888, and all debts, dues, rentals, claims and demands of every name and nature however, arising against the said city, whether such have heretofore accrued and are now existing, or may at any time hereafter accrue to said company.' The conveyance from the purchaser at foreclosure sale to the city contained likewise the same provisions as hereinbefore referred to." To our minds this is a very unsatisfactory pretext under which to claim the right to retain over \$1,500 which defendant admits was collected under the seven-mill levy, and which under its contract with the water company it agreed should be "levied and kept as a separate fund known as the 'water fund' and shall be irrevocably and exclusively devoted to the payment of hydrant rentals under this ordinance, and shall not be otherwise employed." Plaintiff had, with the full knowledge of the city, become the owner of the three judgments long prior to the commencement of the foreclosure proceedings in the federal court. He thereby became entitled to receive all hydrant rentals derived from the seven-mill levy. Such rentals, as soon as collected, became a trust fund to "be irrevocably and ex-

clusively devoted to the payment" of his judgments. The simple fact that the water company was unable to meet its obligations and its property was sold to meet the same ought not to, and does not, prevent plaintiff from now insisting that the city pay over to him moneys which the city had collected under the law and under its contract with the water company, and which, the moment it was collected, became a trust fund for the specific purpose, "irrevocably," of paying the water company, or its assignee, what the city owed for hydrant rentals. When it purchased the water-works system from the grantee of the receiver, it knew that it had this money, and that the money constituted a trust fund to be applied as above indicated; and the stipulation quoted from the receiver's deed in no manner relieves it from its liability therefor.

The other questions argued in the briefs and at the bar are important questions, which we now think we made a mistake in permitting the parties to press upon us in this action. They are questions which it is not necessary, nor proper, to decide at this time. This action is, to all intents and purposes, one to revive dormant judgments, and will be so treated. The only questions we are called upon to decide are whether the judgments are void, and, if not, whether or not they have been paid. That they are valid judgments is *res judicata*; that they have not been paid is conceded by the stipulation above set out. Hence, the judgments ought to be revived.

The judgment of the district court is therefore reversed and the cause remanded, with directions to enter judgment of revivor of the three judgments in controversy.

REVERSED.

REESE, C. J., not sitting.

ROSE, J., dissenting.

HAMER, J., concurring.

This action is brought upon three judgments rendered

in the district court for Custer county in favor of the Broken Bow Water-Works Company and against the city of Broken Bow, in the years 1892, 1893, and 1894. These judgments were purchased by the plaintiff, who is the appellant. They cover the alleged difference between the price at which the water-works company was to supply the city of Broken Bow with water under a franchise contract with that city and the amount raised and paid out of the levy of an annual tax of seven mills on the dollar upon the taxable property within the state. The three judgments are by this action sought to be revived. It is claimed by the defendant that these judgments must be deemed to be paid because the city exhausted its taxing powers for the payment of hydrant rentals when it levied a seven-mill tax. To the defendant's answer that the three judgments were void, the plaintiff replied that the matter in controversy is *res judicata*, and that the judgments are valid because heretofore declared to be valid in a suit between the same parties in a court of competent jurisdiction. Section 9 of the ordinance provides that the franchise and license granted shall remain in full force and effect for 25 years; that the said city of Broken Bow shall take 30 hydrants during said term of 25 years at the rate of \$85 per annum until such time as there are 150 water consumers, and thereafter that the rate shall be \$75 per annum for each hydrant up to 50, and above 50 that the price paid by the city shall be \$60 per annum. There was a specific promise to pay the price stipulated. It is the contention of the city that, notwithstanding its promise to pay the stipulated price for a supply of water to be furnished through these hydrants, yet the promise is not binding because of the further agreement to levy a tax. As the writer understands the oral argument of counsel for Broken Bow, it seems to make the concession that the legislature and contractors may have contemplated that the seven-mill levy to pay for the use of hydrants might be entirely inadequate at the commencement of the term at the contract price for each year, yet

that towns grow in population and that the value of the taxable property increases, and that it may have been considered by the contracting parties that within the full 25-year period or term of the contract the value of the taxable property of the city would probably increase so that the levy might aggregate enough to pay off the debt; but, nevertheless, counsel for the city make the contention that the levies made and applied exhausted the ability of the city to pay, and therefore paid the debt. Every intelligent person knows that the value of the taxable property in a frontier town multiplies rapidly if the town is prosperous. If the full amount for any one year is not raised, then is there any reason why the remainder of the 25 years and the growth of the city during that time and the increase of its taxable property may not be considered? It is the contention of the city that, because the promise to pay contained a condition that seven mills on the dollar should be annually levied upon the taxable property to meet payments under the ordinance, therefore the city was not bound to pay anything more than the tax specified.

In the *City of Austin v. Cahill*, 99 Tex. 172, 88 S. W. 542, the city had issued its bonds for water and light, and the ordinance provided that there should be levied and collected for the year 1890, and for each year thereafter, a tax to pay the interest and provide a sinking fund. There was a limit allowed by the constitution of $2\frac{1}{2}$ per cent. on the taxable property of the city for any one year. It was held that the neglect of the city to perform its contractual obligations did not enable the city to escape that duty, and that it might be forced to perform the same by mandamus.

In *East St. Louis v. Amy*, 120 U. S. 600, the city of East St. Louis issued its bonds, and had neglected to make the levy for a number of years, when the plaintiff sued to compel payment. It was objected that a tax could not be levied in any one year sufficient to make good the past defaults. Chief Justice Waite said: "The accumulation

of the debt was caused by their own neglect. * * * We see no reason why it was not in the power of the court to order a single levy to meet the entire judgment."

In *Coy v. City Council of Lyons City*, 17 Ia. 1, the court said: "The object of the suit is to compel payment, and the defense only shows an inability, under the law, to levy sufficient to satisfy it in *one* year, but a clear ability to do it in *subsequent* years. The court * * * will grant complete relief by providing for the payment of the whole debt."

In *City of Cleveland v. United States*, 111 Fed. 341, where there was a limit to which the city could tax, and and it had neglected to make the levy in former years as provided by the contract, the court held that there was no reason why the relator should be without relief simply because it was beyond the power of the city to levy the whole amount in any one year.

Four opinions have been delivered by this court which relate to this case. The first was prepared by Commissioner FRANK IRVINE, who describes the case as "an action by the city of Broken Bow, with which joined a citizen and taxpayer (Taylor Flick) against the Broken Bow Water-Works Company and others to enjoin the defendants from enforcing three certain judgments recovered by the water-works company against the city." *City of Broken Bow v. Broken Bow Water-Works Co.*, 57 Neb. 548. The opinion in that case (which we will call the Taylor Flick case) makes the subject matter of this particular case *res judicata*. After this comes the case of *State v. Royse*, 3 Neb. (Unof.) 262, filed July 1, 1902, three years after the *Flick* case was decided. There was a rehearing in the *Royse* case November 18, 1903, and Commissioner OLDHAM prepared a second opinion 3 Neb. (Unof.) 269. Then there was a second motion for rehearing, and Chief Justice HOLCOMB wrote an opinion filed February 4, 1904, denying the motion. 71 Neb. 1.

The first of the OLDHAM opinions in the *Royse* case contains this statement (p. 266): "A judgment against

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a city or county is but an audited demand against such municipality which is no longer open to contest." The first OLDHAM opinion holds that the claim is audited; that it stands against the city; that it is no longer open to contest; and declares that it will not issue the writ of mandamus to compel the levy of a tax, because there is no power then to do so, meaning at that particular time, but not excluding a consideration of the future. It does not follow that the full limit of 10 mills on the dollar will be required to pay the current expenses of the city for each ensuing year. If there should be an excess raised by the levy of 10 mills above that required to pay the general expenses of the city, then it would seem that such sum might be applied. In the second OLDHAM opinion it is said: "We are asked to re-examine and depart from the doctrine of *United States v. County of Macon*, 99 U. S. 582, 591, 25 L. ed. 331, relied upon to support the conclusion reached at the former hearing, because the facts of this case take it without the reason of the rule there established and bring it within the rule laid down in *United States v. County of Clark*, 96 U. S. 211, and, also, in *Ft. Madison Water Co. v. City of Ft. Madison*, 110 Fed. 901. * * * The special taxes provided for by the statutes construed in each of these cases were held to be an additional grant of power to provide 'a particular fund as additional security for the payment of a debt,' and not as limitations on the power to enter into the various contracts." What OLDHAM said is not reversed or in any way annulled by the HOLCOMB opinion.

In *United States v. County of Macon*, 99 U. S. 582, it was said: "The judgment has the effect of a judicial determination of the validity of his demand and of the amount that is due, but it gives him no new rights in respect to the means of payment." In that case a mandamus was refused, but it was not determined that the money due might not some time be collected.

In *United States v. County of Clark*, 96 U. S. 211, it was held: "That the bonds are debts of the county as

fully as any other of its liabilities, and that for any balance remaining due on account of principal or interest after the application thereto of the proceeds of such tax the holders of them *are entitled to payment out of the general funds of the county.*" In the body of the opinion it was said: "There is no provision in the act that the proceeds of the special tax alone shall be applied to the payment of the bonds. None is expressed, and none, we think, can fairly be implied. It is no uncommon thing in legislation to provide a particular fund as additional security for the payment of a debt. It has often been done by the states, and more than once by the federal government. The act of congress of February 25, 1862 (12 Stat. 346), set apart the coin paid for duties on imported goods as a special fund for the payment of interest on the public debt and for the purchase of one per cent. thereof for a sinking fund; yet no one ever thought the obligation to pay the debt is limited by the amount of the duties collected. Limitations upon a special fund provided to *aid in the payment of a debt are in no sense restrictions of the liability of the debtor.* * * * And it is not to be inferred, from a provision giving the creditor the benefit of a special fund, that it was intended to place him in a worse position than that he would have occupied had no such provision been made. And that, too, in the absence of any direction that he must look exclusively to that fund. Such is not a reasonable construction of the statute. Such is not a fair implication of its purpose. It accords neither with its letter nor with its spirit."

It does not follow that ten mills on the dollar would be required to pay the general expenses of the city every year. Then, if there should be an excess raised by the levy of ten mills above that required to pay the general expenses of the city, it would be proper under the last OLDHAM opinion to apply that sum. In the HOLCOMB opinion it is said: "It is agreed that the judgments owned by the relator *represent an adjudication of the liability of the city of Broken Bow, for sums due as hydrant rental*

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or for water supply for fire protection furnished by the water-works company to the city, under an ordinance enacted for that and other purposes, and under which the water-works company is operated." It should be remembered that this court, when that opinion was delivered, was only deciding the question that was then before it, and that question was whether at that time, on the then present valuations, and under the then present statute, and with the then existing conditions, a levy of the tax could be compelled. Suppose the general expenses to run the city require ten mills for one year, but suppose that the next year the value of the property in the city has so increased that it no longer requires ten mills for the running expenses and that seven mills will pay them, then there would be an excess of three mills to be used for the payment and satisfaction of any indebtedness due from the city. It is hardly credible that the city intended to deny to the holder of the contract any right to look beyond the slender provision for the payment of interest and principal furnished by a levy of only seven mills on the dollar. What could have been the purpose of contracting the liability if it was not to be paid? But it was adjudicated in the *Taylor Flick* case and stipulated that the judgments were owned by the plaintiff in this case, and that they represent an adjudication of the liability of the city of Broken Bow for the sums due as hydrant rentals. The three judgments sued on being rendered in 1892, 1893, and 1894, were therefore in existence long before the foreclosure proceedings in the United States circuit court were commenced, and these judgments were the property of the plaintiff in this case and could not have been divested by that proceeding. The contention of the city that the contract originally made is *ultra vires* was disposed of and became *res judicata* against the city and in favor of the plaintiff January 19, 1899, by the IRVINE opinion (57 Neb. 548), and long before the HOLCOMB opinion (71 Neb. 1), filed February 4, 1904. The HOLCOMB opinion could not have decided that which had already been determined

by this court when it delivered the IRVINE opinion. The district court in the *Taylor Flick* case, in which the IRVINE opinion was delivered (57 Neb. 548), held that the original judgments were "null and void" and "perpetually enjoined" the defendants "from collecting or attempting to collect said judgments or any part thereof." But on appeal this court held the case to be "wholly without merit," and reversed the judgment of the district court. The identical questions here sought to be raised were then raised and determined in the district court in favor of the city and the taxpayer, Taylor Flick, and on appeal this court reversed the judgment as announced in the IRVINE opinion.

In *United States v. County of Clark, supra*, a county had subscribed for stock of a railroad corporation, and had issued bonds in payment thereof, pursuant to a law which authorized a levy of a special tax to pay them "not to exceed one-twentieth of one per cent. upon the assessed value of taxable property for each year." Among other conditions, it was urged by the defense that the relator was not entitled to a warrant payable out of the ordinary revenues of the county. The United States supreme court said: "The question presented by the record is, whether the relator is entitled to payment of his judgment out of the *general funds* of the county, so far as the special tax of one-twentieth of one per cent. is insufficient to pay it." An examination of the decision in *United States v. County of Clark, supra*, shows that it was held that the bonds were the debts of the county as fully as *any other of the county's liabilities*, and that for any balance remaining due on account of principal or interest after the application of the proceeds of the tax, being not to exceed one-twentieth of one per cent. upon the assessed value of the taxable property for each year, the holders would be entitled to payment *out of the general fund of the county*. This view is clearly and ably expressed by Justice Strong in *Macon County v. Huidekoper*, 33 L. ed. (U. S.) 914 (134 U. S. 332). The first point in the syl-

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labus in that case reads: "Under the Missouri law authorizing a county to subscribe to stock of the Missouri & Mississippi Railroad Company, and issue bonds therefor, and levy a tax of one-twentieth of one per cent. to pay same, after applying said tax to the payment of a judgment on interest coupons of said bonds, the balance due on such judgment is a liability of the county to be paid out of its general funds." The second point in the syllabus reads: "The statutes of the state having authorized the county to levy another tax of one-half of one per cent. for county purposes, the owner of the judgment may by mandamus compel the county to levy the full amount of said last-named tax, and apply it to the payment of the said balance due on said judgment *pro rata* with other demands against the county." If we apply the doctrine laid down in the last case above cited to the instant case, it will be seen that the city is liable for the full amount which it promised to pay, and that it has not satisfied the debt by levying and collecting a seven-mill tax and applying the same on the debt, and that, if there is a surplus at any time beyond the ten per cent. for current expenses, it can be applied on the debt, and, if there is a failure to levy the ten per cent. allowed under the law, then that the city can be compelled to make such levy, and that the surplus will be available to apply on the debt.

Under the oral stipulation and by reason of the judgment rendered in the *Taylor Flick* case (57 Neb. 548) the validity of the judgments was determined. Of this *Taylor Flick* case Commissioner IRVINE, in delivering the opinion of this court, says: "The petition did not state a cause of action." He then sets out the contents of the petition, being the ordinance in full, the alleged levy of seven mills tax each year, and the statement that the judgments, with accrued interest, amounted to \$8,685.78, all of which the plaintiffs then averred to be in excess of the limit stipulated by said ordinance, and also in excess of the amount that said city could lawfully contract to pay for water service. The question was then discussed

in the opinion that the contention of the city and Taylor Flick was that the city could not lawfully contract to pay more than seven mills on the dollar each year. If that question was fairly submitted before the district court and was determined by it, and an appeal was taken to this court from the judgment of the district court and a new judgment announced, then that ought to forever settle it. The view of the district court is shown by the judgment rendered for the city, and the view of this court is shown by the fact that this court on appeal dismissed the action, and so decided against the city. The IRVINE opinion says that the sum realized by the levy of seven mills on the dollar proved insufficient to pay the company the stipulated rate per hydrant, and that by the year 1892, the deficit amounted to over \$4,000, and that the city answered confessing its liability, and that judgment was entered against it, and that in 1893 and 1894, other deficiencies having arisen, judgments were again taken. The petition alleged that the said sum of \$8,685.78 was in excess of the limit stipulated in the ordinance, and in excess of the amount that the city could lawfully contract to pay, and this contention was determined against the city of Broken Bow and against Taylor Flick by this court. The IRVINE opinion says: "It is the first time we have heard that one conceiving money to be justly due him is guilty of fraud or any other sin in seeking payment, or in threatening to resort to the remedy afforded by law for that purpose. There is no allegation that any facts were misrepresented, or that the company did other than to threaten suit to recover a demand it deemed just." This court determined that the injunction granted by the district court should not have been granted, that "the case is wholly without merit," and reversed the judgment of the district court. That judgment of this court still stands. This court is not at liberty to decide upon the present record concerning the merits of the controversy because of the fact that the former attack upon their validity and enforceability was decided adversely to the

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city by this court, and the city by the judgment rendered at that time is forever barred. If the validity of the three judgments sued on has become *res judicata*, it is idle to make any inquiry concerning the inherent validity or invalidity of the contract which went into these judgments; for, if the judgments have been declared valid by the action of this court, then the parties and the court are bound by the prior adjudication.

This action is to be regarded as one upon domestic judgments, or as an action to revive dormant judgments *Snell v. Ruc*, 72 Neb. 571. The plaintiff owns these judgments; they have not been paid; on their face they are dormant. They ought to be revived.

It is the opinion of the writer that, where a case is tried in the district court upon pleadings which necessarily require a consideration of the issues and facts in dispute between the parties, and such issues and facts are determined by such court in favor of the plaintiff and its judgment is rendered concerning them in favor of the plaintiff, and thereafter on appeal the case is considered by this court, and the judgment of the district court is reversed and this court renders its judgment against the plaintiff and in favor of the defendant, a subsequent examination of the same issues and facts in a new case in the district court between the same parties will be considered barred, and the subject matter of the inquiry and the condition of the parties relating thereto will be regarded as *res judicata*.

SEDGWICK, J., dissenting.

The majority opinion refuses to determine the principal questions presented in the case, but leaves them "to be considered, should they ever subsequently arise, in an action under issues properly framed and which squarely present such questions." Thus, the door is opened and further litigation invited. It seems to me that the issues are "properly framed" and that the matters thus evaded are "squarely" presented. This is an action at law upon

domestic judgments, and the prayer of the petition is for a money judgment "of \$6,482.38, together with interest as aforesaid, and costs of suit." There was no application to revive dormant judgments, and no conditional order of revivor. The answer is essentially an equitable defense. It sets up in detail all of the facts relied upon to defeat the collection of the judgments sued upon, with a prayer that the plaintiff be "enjoined from prosecuting his said action further, and from collecting or attempting to collect said judgments and each of them and the amounts alleged to be due (on) them, and that said judgments and each of them may be declared null and void and of no force and effect, and that it may be found and decreed that the defendant, the city of Broken Bow, is not liable to the plaintiff for said sums or for any sum whatsoever," and concludes with a prayer for general equitable relief. To this answer the plaintiff filed a reply. The reply consists of 24 sheets of closely typewritten matter, setting out all of the facts involved in the litigation and all of the equities of the parties. The case is, therefore, a general action in equity to determine and adjust the rights of the parties growing out of these complicated transactions, and the whole matter should be disposed of and the litigation ended.

I am not aware of any other form of action that this plaintiff could bring that would more properly or fairly present the questions that these parties have tried to present. If there can, under our practice, be an action more "properly framed" which would more "squarely present such questions," the majority opinion does not indicate what that action would be.

By the second paragraph of the syllabus it is declared that in an action upon domestic judgments the creditor may have both a new judgment and a revivor of the old, and yet in this case he is allowed only a revivor of the old judgments without regard to equitable defenses.

In statutory proceedings to revive a judgment, if it is conceded that the judgment was originally valid, the only

remaining question is whether since its rendition it has been satisfied. If, because of things that have been done or have occurred since the judgment was rendered, there is no longer any legal liability thereon, the judgment is satisfied and cannot be revived. If this was strictly the statutory proceeding to revive these judgments, the practice a hundred years ago might have been to formally revive the judgments and remit the parties to further litigation. Under the old practice in such cases, the defendant might bring his action on the equity side of the court and enjoin further proceedings at law to revive the judgment until the equities arising thereon after the judgment was rendered could be adjusted between the parties. It has always been considered idle to revive judgments upon which the law will not allow anything to be collected. Our code provides that a defendant may allege any defense that he has, whether legal or equitable, or both. It seems very strange, when an action is brought on a judgment for the sole purpose of determining how much there is due thereon, and equities are alleged in defense showing that a less amount is really due than the face of the judgment sued upon, to evade the issues so presented and tried in the lower court, and change the action into the statutory proceeding to revive, and so avoid passing upon the issues properly presented. Time was when such practice was indulged in by some technical courts, but I supposed that time was long past, especially in this state. These issues cannot be satisfactorily tried in an action of mandamus to compel a levy to pay these judgments, unless the defendant is allowed to present the same equitable defenses that are presented here. Long after the courts had abandoned the old practice of refusing to consider equitable defenses in actions at law upon judgments, they still refused equitable defenses in actions of mandamus. To be consistent with the decision in this case, the majority must therefore refuse all equitable defenses if another action of that nature should be brought. It seems, therefore, impossible to foretell when and where the litigation is to end.

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I think the whole matter should be disposed of now in this equitable proceeding where all of the matters in dispute are presented.

The concurring opinion attempts to discuss the merits of the case, but that discussion is unsatisfactory to my mind, and, of course, is useless in view of the decision of the majority of the court.

LETTON, J.

I concur in the opinion of Judge FAWCETT reviving the judgment so as to permit them to be used to reach the money in the hands of the city arising from the seven-mill levy, if the same is properly liable to be so applied, but express no opinion as to that issue.

I think Judge SEDGWICK is right in his dissenting opinion as to the desirability of ending the litigation, and believe that no recovery can be had in excess of the annual seven-mill levy.

JOHN A. RANDALL, RECEIVER, APPELLEE, v. W. H. MCCLAIN ET AL., APPELLANTS.

FILED OCTOBER 17, 1913. No. 17,174.

Insurance: MUTUAL COMPANIES: INSOLVENCY: PROCEEDINGS AGAINST MEMBERS. Record examined, and held that the case at bar is ruled by *McCall v. Bowen*, 91 Neb. 241.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

Stewart, Williams & Brown, Shepherd & Ripley, Baldrige, De Bord & Fradenburg, J. C. Dort, A. D. McCandless, P. W. Scott, L. E. Rouch, Brown & Venrick and B. F. Hastings, for appellants.

Burkett, Wilson & Brown and E. J. Clements, contra.

FAWCETT, J.

The Nebraska Mercantile Mutual Insurance Company

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was organized under the laws of 1897, ch. 45, and was doing business, at the time of its insolvency, under such statute, as amended by chapter 48, laws 1903. In January, 1908, the company was adjudged insolvent, and plaintiff appointed receiver. October 27, 1909, plaintiff, as receiver, by direction of the court, filed his amended petition against defendant McClain and some 800 other defendants, residents of 70 different counties of the state. The action is based upon an assessment declared by the district court against the defendants upon their several contracts or certificates of membership, or policies as they are sometimes called, in the company. The suit is a suit in equity brought in the district court for Lancaster county, in which county some of the defendants resided. Service was had upon them, and a summons issued to each of the counties in the state where other defendants resided, where such defendants were duly served by the sheriffs of their respective counties. Some of the members of the company paid their assessments and are not included in the suit. Some, who were included, made default, and judgments by default were entered against them. The appealing defendants appeared specially and objected to the jurisdiction of the court over their persons, for the reason that they are residents of counties other than Lancaster; were served with summons in the counties of their respective residences by the respective sheriffs thereof; that they are not jointly liable with any defendant of Lancaster county upon the causes of action set forth in the petition, and that no summons had been served upon them as required by law. Their special appearances being overruled, they then separately demurred upon the grounds: (1) That the court had no jurisdiction of the persons of defendants; (2) defect of parties defendant; (3) several causes of action improperly joined; and (4) that the petition does not state a cause of action. Their demurrers being overruled, they answered, some separately, and some joining with others of their county. In their answers they preserve the objections made in their

special appearances, and add that the action was one for the recovery of money only and the summons served contained no indorsement of amount for which judgment would be taken in case of default; that the respective claims against the defendants were several, and not joint; that they could not be brought from the counties of their residences into Lancaster county to defend; that at the time of the alleged assessment there was nothing due from the defendants to the receiver; that no proper or legal assessment was made; that the contracts of insurance limited the liability of defendants to the amount of premium stated in the policy; that defendants are not members of the insurance company in the sense that they can be assessed for the liabilities of the company; that there is no multiplicity of suits; and that defendants were entitled to trial in the counties of their residences, and to a jury. The reply to each answer was a general denial. The decree was in favor of plaintiff upon every issue, and a large number of the defendants have appealed.

We deem it unnecessary to consider the various assignments in detail. Counsel for defendants rely largely upon *Burke v. Scheer*, 89 Neb. 80; while counsel for plaintiff pin their faith to *McCall v. Bowen*, 91 Neb. 241. We think this case is ruled by *McCall v. Bowen*, *supra*. In *Burke v. Scheer*, *supra*, the case was submitted upon a general demurrer to the petition. That case involved a construction of the statute relating to mutual hail insurance societies, the provisions of which are materially different from the provisions of the law under which the insurance company of which plaintiff is receiver was organized. In *Burke v. Scheer* but two questions were in fact determined, viz., that the legislature, by the act governing mutual hail insurance societies, prescribed both the maximum of a member's liability and the form of action by which payment of that liability could be enforced. The petition in that case did not show that any by-laws had ever been adopted, and it was argued by plaintiff that because the liability of the members had not been limited

by the by-laws their liability was unlimited and that each member or policy-holder was personally liable for all of the debts of the company. We held, and quoted the statute to show, that no member could be required to pay more than the amount of his obligation. We also held that under section 124 (Comp. St. 1909, ch. 43) of the act under which the society was operating, which provided that "suits at law may be brought against any member of such company," etc., there was no authority for the receiver to proceed in equity; that, the legislature having prescribed both the maximum of a member's liability and the form of action by which the payment of that liability may be enforced, "we do not think the fact that the company has become insolvent can in any manner enlarge such liability or change the form of action which may be resorted to for its enforcement." That was all we decided or intended to decide in that case. The discussion in the opinion is predicated upon the statute we were then considering, which, as we will show, is quite different from the statute governing mercantile insurance companies. The statute under consideration here (laws 1897, ch. 45) provides: "Section 3. All persons who effect insurance in any company organized under the provisions of this act shall thereby become members of such company and continue to be during the period their insurance is in force, and no longer." Section 9 provides: "If any member of such company for the space of thirty days after written or printed notice of assessment has been mailed to him or her, postpaid and directed to the post office as stated in the application for insurance, shall neglect or refuse to pay the sum assessed, such company may sue for and recover such amount and cost." There is no such provision as section 3 in the law under consideration in *Burke v. Scheer*, and the section as to the bringing of suit expressly provides: "Suits at law may be brought," etc.

In *McCall v. Bowen*, *supra*, the company was organized under the statute authorizing the organization of hog-raisers mutual insurance companies. The provisions of

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that act are set out by Mr. Justice LETTON on page 245 of the opinion, and we held: "The liabilities of a member of a company organized under this act are fully as great as those of a stockholder in an ordinary stock corporation. It is immaterial whether the members of this body corporate be designated as members or stockholders, because during the term that their policy of insurance covers they are as essentially members of the corporate body as owners of stock in a stock corporation are of such a corporation." We reaffirm what is there said. The statute under consideration here being practically identical with the one under consideration in *McCall v. Bowen*, this case must be ruled by that. Having reached this conclusion, defendants' assignments of error must all fail.

AFFIRMED.

SEDGWICK, J., dissenting.

I am not satisfied with the opinion in this case, because it seems to me that the three decisions, *Burke v. Scheer*, 89 Neb. 80, *McCall v. Bowen*, 91 Neb. 241, and the opinion herein are inconsistent with each other and leave the law very much in doubt.

It is said in the majority opinion that this case is ruled by *McCall v. Bowen*, and this is stated in the syllabus as the point of law decided. One reason is stated as determining that this case involves the same question as that decided in *McCall v. Bowen*, and two are stated as determining that it does not involve the question upon which *Burke v. Scheer* depends. None of these reasons, as it seems to me, can be applied at all. The first is that the statute governing this case provides: "All persons who effect insurance in any company organized under the provisions of this act shall thereby become members of such company and continue to be during the period their insurance is in force, and no longer." Laws 1897, ch. 45. sec. 3. A similar provision was held in *McCall v. Bowen* to constitute the policy-holders, as "members" of the

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company, liable jointly and severally for all of the liabilities of the company. This was in *McCall v. Bowen* made the test by which to distinguish that case from *Burke v. Scheer*. If a member must contribute an indefinite amount, his proportionate share of all the liabilities of the company, a court of equity alone can, upon an examination of the whole case, ascertain the amount of liabilities of the company and fix the proportionate share of each member. In such case there is a joint liability and the action may be in equity, making all members of the company parties and adjusting the equities between them. This is the point decided in *McCall v. Bowen*. When the liability of the policy-holder is limited and fixed by the law or the contract, it is held in *Burke v. Scheer* the amount of the liabilities of the company and the liabilities of the policy-holders are alike immaterial to him. He has a fixed amount to pay, and no more under any conditions of the business. There are, therefore, it is there held, no equities between policy-holders and no joint liability or interest.

Section 3 of the act above quoted might by itself be considered to make policy-holders jointly liable for all debts of the company, as the similar provision was considered in *McCall v. Bowen*, if it were not otherwise especially provided in the act we are now construing. The amendment of the act in 1903 was for two purposes. It amends two sections. By section 69k, ch. 43, Comp. St. 1901, which was the tenth section of the original act, the company was not allowed to do business outside of the state, and could not do business in both cities and villages. That section was amended so as to allow the company to do business in both cities and villages in the United States. Section 69q, ch. 43, Comp. St. 1901, which was section 16 of the original act, provided: "No member, his or her heirs, executors, administrators or assigns, can avoid liability to such company for unpaid claims of the company accruing while a member." By the amendment of this section in 1903 (laws 1903, ch. 48) it was provided that the company may in its by-laws limit the liability of its

policy-holders for premiums or assessments to such sums as may be agreed upon, and that it must make such limit of liability on all its policy-holders before going out of the state to do business. Pursuant to that requirement the company did make a by-law limiting the liability of its policy-holders to a specific sum, and the policy issued to the defendants specifically limited the liability of each defendant to a specified amount. This appears to bring the case at bar entirely within the decision in *Burke v. Scheer*, and this case cannot be decided as in the majority opinion without overruling that case. The reasons stated in the majority opinion for holding that *Burke v. Scheer* does not control in this case are that the legislature prescribed "the maximum of a member's liability and the form of action by which payment of that liability could be enforced." The statute plainly does both of these things in the case at bar. I have quoted above the statute in this case prescribing "the maximum of a member's liability," and the statute also provides that, if any member shall fail to pay the assessment "as stated in the application for insurance," such company may sue for and recover such amount and costs. Comp. St. 1901, ch. 43, sec. 69j. If, therefore, the fact that a policy-holder may be sued for the amount specified in his application and policy adds any reason for holding that there is no joint liability, and no ground for equitable jurisdiction, we have it in this statute as well as in that construed in *Burke v. Scheer*. For my part I do not see how this fact adds anything, or, if *Burke v. Scheer* is right, that anything needs to be added to the fact that the statute we are construing authorizes and requires that the policy-holder's liability shall be limited and definitely fixed by the by-laws and policy, and that this was done in this case. This case, then, is not "ruled by *McCall v. Bowen*," but the decision is plainly inconsistent with *Burke v. Scheer*. This decision appears to me to leave the law still more in doubt than it was before.

CITY OF ALBION, APPELLEE, V. BOONE COUNTY, APPELLANT.

FILED OCTOBER 17, 1913. No. 17,218.

1. **Highways: ROAD DISTRICTS: CITIES.** Cities of the second class and villages were road districts within the meaning of section 76 of the road law as it existed prior to the amendment of 1901.
2. **Constitutional Law: TAXATION: ROAD FUND.** The power conferred upon a county to raise a road fund by taxation is not in violation of section 7, art. IX of the constitution, but is a political power, and the application of such fund, when collected, is clearly within the power of the legislature.
3. **Highways: ROAD FUND: CLAIMS AGAINST COUNTIES: POWER TO COMPROMISE.** When a county has collected money for the road fund upon property of a city or village, one-half of such money belongs to the city or village, and the officers of the city or village have no power to compromise the right to such money. *State v. Bisping*, 89 Neb. 100.
4. ———: ———: **COUNTY A TRUSTEE: LACHES.** In such a case, as between the county and city or village, the county does not hold such collections in its own right, but the possession of the one is the possession of the other. The possession of the county is precarious, and not *animo domini*; and, being trustee, it cannot acquire the trust fund by lapse of time, but is charged with the continuing duty to pay the same over to such city or village. *City of Chadron v. Dawes County*, 82 Neb. 614.
5. ———: ———: ———: ———. Nor will the failure of the city or village to demand payment of its portion of said road fund for a series of years, either with or without knowledge on the part of the officers of the city or village of the fact that the county is using all of such fund upon the county roads, constitute laches on the part of such city or village.

APPEAL from the district court for Boone county:
JAMES R. HANNA, JUDGE. *Affirmed.*

Jesse L. Root, O. M. Needham, W. J. Donahue and Albert & Wagner, for appellant.

John J. Sullivan, F. J. Mack and C. E. Spear, contra.

FAWCETT, J.

From a judgment of the district court for Boone county,

in favor of the plaintiff, a city of the second class, for one-half of the road tax levied and collected by the defendant county upon the taxable property within the limits of plaintiff city, during the years 1883 to 1906, inclusive, except the year 1902, defendant appeals.

A plea of *res judicata* is interposed as to all of the years prior to and including 1902. The allegations in support of this plea are that in 1904 plaintiff filed a claim with the county for certain sums which it claimed were then due as plaintiff's share of the county road fund tax; that on October 4, 1904, this claim was adjudicated by allowing the same in part and disallowing it as to the other part; that the amount allowed was \$362.22, which it is alleged plaintiff accepted in full and complete settlement of all such taxes due, and that it was understood and agreed between plaintiff and defendant that such sum was to be and was accepted as such full settlement. It is further alleged that no appeal was ever taken from that adjudication by the board. The reply admits that no appeal was taken, but denies that there was any adjudication by the board of any portion of its claim except the specific item for the year 1902; alleges that the claim filed by plaintiff at that time was itemized for the years 1900, 1901 and 1902; that the board took no action whatever as to the claims of 1900 and 1901; that it indorsed on plaintiff's claim the word "allowed" after the item as to the year 1902, and as to the years 1900 and 1901 indorsed the claim as follows: "No action taken on claims for 1900 and 1901." The plea of *res judicata* must fail for two reasons: (1) The record sustains the allegations of the reply as to the action of the board October 4, 1904, with respect to the claim for the years 1900 and 1901. (2) Even if the officers of plaintiff city had attempted to compromise the city's claim against the county by accepting payment of one year as a full settlement of all preceding years, such attempt would have been in excess of their powers and therefore futile. *State v. Bisping*, 89 Neb. 100.

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It is urged that section 7, art. IX of the constitution, is a bar to plaintiff's right to maintain this action for any part of the road fund tax levied by the county authorities. This section reads: "The legislature shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes." We are unable to see any application of this section of the constitution to the case at bar. The legislature has not anywhere in the road law under consideration attempted to "impose taxes upon municipal corporations." It has simply directed the manner of distribution of the taxes levied by the duly constituted county authorities. This it had a perfect right to do. The power conferred upon a county to raise a road fund by taxation is a political power, and its application, when collected, is clearly within the power of the legislature.

By the seventh assignment it is urged that plaintiff's action is barred by the statute of limitations. This assignment is not seriously contended for in the brief, the main stress upon this branch of the case being laid upon the eighth assignment, that upon the undisputed facts of the case plaintiff has been guilty of such laches that this action ought not to be maintained. These two assignments must both be disposed of adversely to plaintiff on the authority of *City of Chadron v. Dawes County*, 82 Neb. 614, and the authorities there cited.

The remaining assignments are that plaintiff's petition does not state facts sufficient to constitute a cause of action; that the finding and judgment of the district court are not sustained by sufficient evidence, and that they are contrary to law. If the assignment that the judgment is contrary to law fails, the other assignments must also fail. This brings us to the controlling question in the case: Does the law, viz., the statutes of this state, sustain the judgment? In deciding this point, we need not do more than consider section 76 of the road law as it has existed from 1881 to the time of the commencement of this action. So far as this section has stood from 1901 to the

present time, it is ruled by *City of Chadron v. Dawes County, supra*. That case has since been followed in *City of Crawford v. Darrow*, 87 Neb. 494, and *State v. Bisping, supra*. We are satisfied with the holding in those cases and adhere to them.

With reference to section 76 (Comp. St. 1899, ch. 78) as it stood prior to 1901, we might well rest our decision upon *Libby v. State*, 59 Neb. 264, which was decided November 9, 1899. In the opinion in that case (p. 268) it was said by SULLIVAN, J.: "In an earnest endeavor to discover the will of the lawmaking body, we have followed the learned counsel for respondent into a jungle of enactments, ancient and modern, among which the mind loses itself and can find no way out. The truth of the matter is that no very tangible evidence of the legislative purpose touching the disposition of money like that here in dispute is anywhere discernible. And yet we think there is enough to warrant us in holding that section 76 of the road law is applicable to incorporated municipalities, and that they are to be regarded as road districts within the meaning of that section." Notwithstanding the warning here sounded by the learned judge, we have again followed counsel into this "jungle of enactments, ancient and modern," endeavoring, while in this jungle, to keep the mind from losing itself, and to find a clear way out. The difference between section 76 prior and subsequent to 1901 is that prior thereto the section did not specifically include cities of the second class and villages within its requirement that the county commissioners, after levying the same rate of road tax on property within any incorporated city, might retain one-half of the tax so levied and collected and should pay the other half to the council of said cities to be used for road purposes. It is now argued that, there being no statutory provision prior to 1901 requiring the county board to pay over to cities of the second class and villages one-half of the tax collected from property within the corporate limits of such city or village, plaintiff cannot maintain this action for the taxes

so collected for the years 1883 to 1899, inclusive. We were quite strongly impressed with the argument of counsel for defendant at the bar upon this point, and in our tentative consultation at the close of the argument we were rather inclined to the belief that the contention would have to be sustained; but upon more careful consideration of the question, and after a painstaking examination of the statutes for each year from 1881 to 1899, inclusive, we are constrained to hold that defendant's contention upon this point must also fail. Section 76 as it stood in 1881 (Comp. St. 1881, ch. 78) provides: "In counties not under township organization, one-half of all the moneys paid into the county treasury in discharge of road tax shall constitute a county road fund, which shall be at the disposal of the county commissioners for the general benefit of the county, for road purposes; the other half of all moneys paid into the county treasury in discharge of road tax, and all money paid in discharge of labor tax, shall constitute a district road fund, which shall be paid by the county treasurer to the overseer of the road district from which it was collected, and expended by him only for the following purposes: *First.* For the construction and repair of bridges and culverts, and making fire-guards along the line of roads. *Second.* For the payment of damages of the right of any public road. *Third.* For the payment of wages of overseers, and for the expense of procuring the necessary guide-boards. *Fourth.* For the payment of wages of commissioners of roads, surveyor, chainmen, and other persons engaged in locating or altering any county road, if the road be finally established or altered as hereinbefore provided. *Fifth.* For work and repairs upon road." The section stood thus until 1891, when, without other change, there was added to it this proviso: "*Provided*, that the county commissioners of counties not under township organization may levy the same rate of road tax upon the property within any incorporated city of the metropolitan class and cities of the first class as is levied upon the property situated within the several

road districts, and all moneys paid into the county treasury in discharge of road tax levied upon property within the incorporate limits of any such city shall constitute a part of the general road fund of the county, and be subject to the disposal of the county commissioners for the general benefit of the county and city, one-half of which shall go to the county for road purposes and one-half to the council of said cities to be used for road purposes." The section stood thus until 1899, when the concluding clause of the proviso was changed so as to read: "And one-half to the council of said cities to be used under the direction and control of the board of park commissioners of such cities in the construction and improvements of roadways in the system of parks, parkways and boulevards of such cities." At the next session of the legislature the proviso was again amended so as to include cities of the second class and villages with cities of the metropolitan and first class, and by providing that one-half of the tax levied upon property within any incorporated city of any of the classes named "shall go to the county for road purposes and one-half to the council of said cities to be used for road purposes." The section stood thus until 1905 when it was again amended. This amendment, however, did not affect cities of the second class and villages, the provision as to them remaining the same as it was fixed in 1901, the only change in 1905 being as to cities of the metropolitan class, as to which the one-half is to be used under the direction and control of the park commissioners. In 1907 the section was again amended, and portions of the section as it originally stood were eliminated, but still providing that one-half of all such taxes levied upon property within any of the cities named should, when collected, be paid to the city or village where levied. And so the section has remained ever since.

A careful reading of this section, as it appears from time to time through all of the years named, shows that it was always the legislative intent that only one-half of the moneys paid into the county treasury in discharge of road

taxes should constitute a county road fund which should be at the disposal of the county commissioners, and that as to the other half of the moneys so collected it was always the intent of the legislature that such portion should be used by the proper officers and expended for the benefit of the particular district from which it was collected. The legislative intent being thus clearly ascertainable, it seems to us to be immaterial that in some of the years the section required the portion of the tax collected within any particular district to be paid to the overseer of that district, while in others it provided that it should be paid to the council of an incorporated city. It is clear that the legislature never intended that the county commissioners could levy a tax upon all property in the county, and, when that tax was paid in, use the whole of it for any particular roads or bridges in the county it saw fit, thus compelling certain districts of the county to pay road taxes upon the property within those districts without having any voice in the distribution or any benefit from the use of any portion of it. The justice of the legislative intent is apparent. All of the county roads in a county are maintained for the benefit of the citizens of the entire county, and the citizens of the entire county should contribute something towards the support of all of the roads in the county; and the legislature in its wisdom concluded that it would be just to take one-half of all the road taxes collected within the county and place that fund in the hands of the county commissioners "as a county road fund," to be used "for the general benefit of the county, for road purposes." Having done that, the legislature felt that, as to the other half of the money paid, the citizens who were required to pay it should be entitled to have that portion of the tax used in their own locality. That this is eminently just, when applied to incorporated cities and villages, is still more apparent when we consider that cities and villages, if the portion which they receive from the road fund is not sufficient to keep their streets and alleys in a reasonably safe condition for travel, not only

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by residents of the city but by the inhabitants of the county generally, must raise such additional sums as may be necessary to keep them in such condition; and this additional fund they must raise by a tax on property within their corporate limits. So that, while incorporated cities are contributing one-half of the road tax levied upon their property to the county, for the benefit of the roads and bridges, they receive nothing from the county except the one-half of the tax levied upon their own property with which to keep their streets and alleys in good condition, and must themselves raise such additional sums as may be required for such purpose.

This brings us to a consideration of *Libby v. State, supra*, in which, after considering the condition of the road law as it had existed prior thereto, we held that "incorporated municipalities are road districts within the meaning of section 76 of the road law." The decision in that case was handed down, it must be remembered, prior to the amendment of 1901, at a time when cities of the second class and villages were not specifically included within section 76 of the road law. When we decided *City of Chadron v. Dawes County, supra*, we considered *Libby v. State*, and particularly that portion of the decision which held that incorporated municipalities are road districts within the meaning of section 76, and held that, "considering the question as a new one, we are constrained to reach the same determination." In the light of these cases, which we still adhere to, we hold that during all of the years in controversy here plaintiff was entitled to have paid over to it one-half of all of the road tax levied and collected upon property within its corporate limits.

The judgment of the district court being in harmony with this holding, it is

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

Village of Cedar Rapids v. Boone County.Village of Petersburg v. Boone County.

VILLAGE OF CEDAR RAPIDS, APPELLEE, v. BOONE COUNTY,
APPELLANT.

FILED OCTOBER 17, 1913. No. 17,219.

APPEAL from the district court for Boone county:
JAMES R. HANNA, JUDGE. *Affirmed.*

*Jesse L. Root, O. M. Needham, W. J. Donahue, and
Albert & Wagner, for appellant.*

F. J. Mack, contra.

FAWCETT, J.

The pleadings and the evidence in this case, and the law applicable thereto are in all respects the same as those in *City of Albion v. Boone County, ante*, p. 494, except only as to the amount of the plaintiff's claim and the amount of the judgment entered thereon.

For the reasons stated in the opinion in that case, the judgment of the district court is

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

VILLAGE OF PETERSBURG, APPELLEE, v. BOONE COUNTY,
APPELLANT.

FILED OCTOBER 17, 1913. No. 17,220.

APPEAL from the district court for Boone county:
JAMES R. HANNA, JUDGE. *Affirmed.*

*Jesse L. Root, O. M. Needham, W. J. Donahue and Al-
bert & Wagner, for appellant.*

F. J. Mack, contra.

FAWCETT, J.

The pleadings and the evidence in this case, and the law applicable thereto are in all respects the same as those in *City of Albion v. Boone County*, ante, p. 494, except only as to the amount of the plaintiff's claim and the amount of the judgment entered thereon.

For the reasons stated in the opinion in that case, the judgment of the district court is

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

VILLAGE OF ST. EDWARD, APPELLEE, v. BOONE COUNTY,
APPELLANT.

FILED OCTOBER 17, 1913. No. 17,221.

APPEAL from the district court for Boone county: JAMES R. HANNA, JUDGE. *Affirmed*.

Jesse L. Root, O. M. Needham, W. J. Donahue and Albert & Wagner, for appellant.

F. J. Mack, contra.

FAWCETT, J.

The pleadings and the evidence in this case, and the law applicable thereto are in all respects the same as those in *City of Albion v. Boone County*, ante, p. 494, except only as to the amount of the plaintiff's claim and the amount of the judgment entered thereon.

For the reasons stated in the opinion in that case, the judgment of the district court is

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

RAEGINALD J. MACK, APPELLEE, v. ARTHUR MACK,
APPELLANT.

FILED OCTOBER 17, 1913. No. 18,030.

1. **Trial: INSTRUCTIONS: DAMAGES.** The instruction set out in the opinion, approved.
2. **Appeal: ADMISSION OF EVIDENCE.** The rulings of the court in the admission and exclusion of evidence set out in the opinion, approved.
3. ———: **CONFLICTING EVIDENCE.** A verdict based upon conflicting evidence will not be disturbed unless manifestly wrong.

APPEAL from the district court for Stanton county:
GUY T. GRAVES, JUDGE. *Affirmed.*

W. W. Young, for appellant.

Allen & Dowling, contra.

FAWCETT, J.

This case is before us a second time. For a statement as to plaintiff's claim, and the answer thereto, reference is made to our opinion on the former hearing. *Mack v. Mack*, 87 Neb. 819. We there reversed the judgment of the district court in favor of defendant, which was based upon a directed verdict on the theory that the contract set out by plaintiff was void, as against public policy, and without consideration. Upon a retrial plaintiff recovered a verdict for \$2,000, upon which judgment was rendered, and defendant appeals.

It is first urged that the court erred in giving instruction No. 5½, as follows: "If you find the plaintiff entitled to recover, you will assess the amount of her damages in such sum as the evidence may show she has sustained, not exceeding the sum of \$6,000. And in assessing her damages you will take into consideration her age, her life expectancy, the amount that will be reasonably necessary to make provision for her support in furnishing her shel-

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ter, food, clothing and other necessary expenses in sickness and in health, and from all facts as disclosed by the evidence you will determine the amount of her recovery." It is argued that this instruction was broader than the evidence upon which it was based, and in substance told the jury that if they desired to do so, upon the evidence, they might return a verdict in the sum of \$6,000, that being the amount prayed for in plaintiff's petition. We do not think the court erred in giving this instruction for two reasons: First, that if plaintiff was entitled to recover at all there is evidence in the record which would have justified a verdict for the full \$6,000; and, second, under the lowest amount testified to by plaintiff as the amount necessary for her support, viz., \$25 a month, it is conceded that the value of her expectancy, as shown by the Carlisle table, would have amounted to \$2,750, or \$750 more than the jury allowed. It is clear, therefore, that the instruction was not prejudicial to defendant.

It is next urged that the court erred in admitting oral testimony as to the contents of a letter, claimed by plaintiff to have been written by defendant to Henry Johnson, a member of the firm of Johnson Brothers. It is true that Henry Johnson, on cross-examination, stated that "the envelope was addressed to Johnson Brothers, but the letter was written to me personally." Taking his testimony as a whole, together with that of plaintiff, who saw the letter, the court and jury were warranted in believing that the letter was written to Henry personally. Henry is a nephew of the plaintiff. The objection to the admission of oral testimony as to the contents of the letter is that no sufficient foundation had been laid; that no testimony was offered to show that a search had been made for the original, etc. Mrs. Mack testified that she saw and read the letter; that after reading it she returned it to Henry; that "Henry asked me for it, so I gave it back to him." Henry testified that he received the letter; that it was in the defendant's handwriting; that it was written in California and "sent to me direct. It was in my posses-

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sion, but has become lost." In answer to the question as to whether he knew where the letter is now, he answered, "No." Conceding that the letter may have been temporarily placed in Johnson Brothers' safe, it appears that the firm had been dissolved prior to the time of trial, and that Henry gave his testimony by deposition in California, to which state he had removed. His brother John, the other member of the firm, testified that no such letter had been received. Under such circumstances, a request for John to make a search for the letter, or the issuance of a *subpoena duces tecum* directing him to bring the letter into court, would have been a useless ceremony. The court did not, therefore, err in the ruling complained of.

The next contention is that the court erred in permitting plaintiff and witnesses called in her behalf to testify as to the cruel treatment of plaintiff's husband. This testimony was clearly admissible. The very foundation of plaintiff's claim was that she was living separate and apart from her husband because of his wrong-doing, consisting of drunkenness and cruel treatment. It was absolutely necessary for her to prove a justifiable absence from her husband, or her alleged contract with the defendant would have been without consideration. If a wife is away from her husband without just cause, it is her duty to return to him whether he be then in sickness or in health, and a contract with a third person that she would return would, under such circumstances, be without consideration.

Another contention is that the court erred in denying to defendant the right to cross-examine the plaintiff as to claims made by her, after her husband's death, to certain real estate standing in the name of the defendant, but which she alleged was the property of her deceased husband. We think this testimony was properly excluded. We are unable to see how that fact would throw any light upon the question as to whether or not the contract between plaintiff and defendant had been entered into.

Lastly, it is urged that the verdict of the jury is not

supported by the evidence. Upon this point there is a direct conflict between the parties. The evidence, we concede, is close. If the testimony of plaintiff is to be believed, she is entitled to the recovery she obtained. If the defendant is to be believed, no contract was ever entered into. The jury were the judges of the credibility of the witnesses. The case was tried by able counsel on both sides, and all of these matters were doubtless urged with vigor and skill to the jury. The jury found the facts as testified to by plaintiff, and the trial judge sustained their finding. We cannot disturb it.

Finding no prejudicial error in the record, the judgment of the district court is

AFFIRMED.

REESE, C. J., ROSE and SEDGWICK, JJ., not sitting.

STATE, EX REL. CHARLES M. MURDOCK, APPELLANT, V.
JACOB A. REULING ET AL., APPELLEES.

FILED OCTOBER 17, 1913. No. 18,095.

Mandamus: INTOXICATING LIQUORS: LICENSE. Where it clearly appears that an attempted appeal by a remonstrant from the granting of a saloon license by the mayor and council of a city is without merit, and is not being prosecuted in good faith nor with reasonable diligence, and, after a lapse of three days from the granting of such license, remonstrant having taken no affirmative action to perfect such appeal, the council orders the license to issue, mandamus will not lie to compel the council to reconvene and recall the same.

APPEAL from the district court for Gage county:
LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

E. O. Kretsinger, Ernest L. Kretsinger and C. M. Murdock, for appellant.

A. D. McCandless and F. E. Crawford, contra.

FAWCETT, J.

This action was instituted by relator in the district court for Gage county, to compel the mayor and city council of the city of Wymore to meet in special or regular session and revoke a saloon license which had been issued to one Daniel O'Donnell. From a judgment denying the writ and dismissing relator's action, relator appeals.

The record shows that in March of the present year O'Donnell and three others applied to the city council of the city of Wymore for saloon licenses. On April 18 the relator filed a remonstrance against all four of the applicants. Upon final hearing the city council, at about the hour of midnight of April 28, overruled the remonstrance and granted a license to each applicant. The relator, who was present at the meeting, tendered a written notice of his intention to appeal and demanded a transcript of the pleadings and evidence. At the commencement of the hearing it was stipulated by the applicants and remonstrator "that the evidence taken upon this hearing shall be taken in shorthand by Ernest J. Kopecky, and by him reduced to longhand in transcript form on demand by the parties in case of appeal to the district court, and his certificate as to the correctness of that evidence to have full faith and credit in the said court." In accordance with remonstrator's demand, Kopecky was ordered to immediately extend his notes, which he promptly did, and had the same ready for delivery at an early hour on the morning of April 30, at which time he delivered it to the city clerk, who filed it at 7 A. M. that morning. There is a conflict in the testimony as to what transpired with reference to this transcript of the evidence during the next three or four days. There is, however, a clear preponderance to the effect that relator knew that the transcript had been delivered by Kopecky to the clerk, within an hour after it had been so delivered; that it remained in the clerk's office all of that day except for about an hour and a half, when Mr. McCandless, attorney for O'Donnell,

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had the transcript out for the purpose of having Mr. Kopecky attach his certificate thereto; that it also remained in the clerk's office all of the next day, May 1; that relator made no request of the city clerk for an inspection of the transcript; that on the morning of May 2 the city clerk took the record to Beatrice and in person delivered it to the clerk of the district court; that in the evening of May 1 counsel for O'Donnell called upon relator and told him that he was going to Beatrice next morning and would be prepared to try the appeal at that time. The interview does not appear to have been a very friendly one, and the attorney, after accusing relator of not acting in good faith with him, departed. On the morning of the 2d counsel for O'Donnell appeared at the district court, and there also appeared present counsel for relator, who stated that he had just received a long-distance telephone from relator, asking him to look into the matter, but stated, in effect, that he had not yet been formally retained. He testified on the present hearing that the transcripts were lying on the clerk's desk, and, upon inquiry by him of the clerk as to whether or not they had been filed, he was informed that they had not; that he then asked counsel for O'Donnell why he did not file them, and was told that the relator had to file them; that, upon inquiry of the clerk, it was learned that the transcripts in two cases were there, being the case of O'Donnell and the case of one Walsh, and that the filing fee for the two cases would be \$7; that he then called up relator by long-distance telephone and advised him as to the situation; that relator stated that he could not be in Beatrice that day; that he had never had the privilege of seeing the transcript; that counsel for O'Donnell had it in his possession; that relator promised to send the filing fees that day or bring the amount up next morning. Nothing was done about filing the transcript with the clerk of the district court that day, and in the evening the city council at a special meeting, called for that purpose, ordered the licenses to issue. On the next day, May 3,

relator, who had already withdrawn his objection to the granting of licenses to all of the applicants except O'Donnell and Walsh, formally withdrew his remonstrance and appeal as to the latter. He appeared at the office of the clerk of the district court on that day and asked for the transcript, stating that he wanted to take it to the office of his counsel for examination. The clerk at first declined to let him take the record out of the office, but, after consultation with the presiding judge, he was permitted to do so. The record was taken by him to the office of his counsel and retained until about the middle of the afternoon, when it was returned to the clerk. During the afternoon of that day a demand was made upon the mayor to convene the council and recall the license that had been issued to O'Donnell, which the mayor declined to do. The transcript, which the city clerk deposited with the clerk of the district court, was certified to by Mr. Kopecky, in accordance with the stipulation, but did not bear the certificate of the mayor or city clerk, nor did the record contain the copy of the remonstrance which had been filed by the relator. On the strength of this, it is contended by relator, in effect, that his appeal had not been perfected by reason of the failure of the city clerk to transmit to the clerk of the district court a proper transcript.

With matters standing thus, relator on May 5 commenced the present action. On May 7 a corrected transcript was filed with the clerk of the district court. This transcript contained the remonstrance and was duly certified to by the city clerk. Upon a hearing of this case May 9, the district court found that the appeal of the remonstrator from the action of the city council was not in good faith; that reasonable diligence had not been used by him in taking or attempting to take such appeal; and that the city council was justified in believing that said appeal would not be perfected and in issuing the license to O'Donnell on May 2. In addition to what has been said

above, there was evidence before the court which, if the learned district judge believed, was sufficient to show that the remonstrance in the first instance was not filed in good faith by relator. The evidence to which we refer was that the hearing of the application had been set down for an earlier date than April 28; that in conversation with counsel for the applicant the relator stated in effect that he had learned that the council was going to limit the number of licenses to four; that what he desired was to make the saloon business as odious as possible in Wyomere, and he therefore wanted licenses issued to a number of saloons; that if they would issue licenses to all of the applicants, of which it was then supposed there would be five or six, he would not file any remonstrance. When the hearing was had, relator made out quite a strong case against the applicant Walsh, but the transcript of the evidence before the council, which has been preserved in the record before us, shows that he utterly failed to make out a case which would justify the council in refusing a license to O'Donnell. After the hearing, and after putting the city to the expense of getting out four transcripts, he first withdrew his appeal as to the applicants Pizar and Frederick, and later withdrew it as to Walsh, the only one of the applicants against whom he could, with any hope of success, have prosecuted an appeal, and allowed the transcript as to O'Donnell to remain in the office of the city clerk for two days and in the office of the clerk of the district court for one full day, without taking any affirmative action to have the appeal docketed. Counsel for O'Donnell, knowing that an appeal as to O'Donnell would be without merit, and learning that the appeal as to Walsh had been abandoned, concluded that all had been abandoned, and demanded that the license issue to his client.

The above is a fair statement of the record that was before the district court at the time he made the findings above set out and dismissed relator's action. The action

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of the court in so doing was fully justified by the record. The judgment is therefore

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

**NATHAN RAY FORSHA, APPELLANT, v. NEBRASKA MOLINE
PLOW COMPANY, APPELLEE.**

FILED OCTOBER 17, 1913. No. 18,071.

1. **Appeal: JOINT TORT-FEASORS: INCONSISTENT VERDICT.** In an action for negligence against several defendants, if the allegations and evidence relate wholly to the negligence of a third party not sued, who was at the time acting for all of the defendants jointly, and no direct act of negligence on the part of any party to the suit is shown, a verdict in favor of one defendant and against others is inconsistent.
2. ———: **REVERSAL ON CONDITION.** In such case, if after all of the evidence is taken and general instructions as to all defendants are given, the jury is instructed to find a verdict in favor of one defendant, and the record fails to show any disposition of the case as to the other defendants, and upon appeal by plaintiff it is stated by his attorney in open court that a verdict was in fact rendered and judgment entered against the other defendants, and that, if the judgment in favor of the one defendant is reversed, he will cause the judgment against the other defendant to be vacated also, the reversal of the judgment appealed from will be made conditional upon the vacation of the judgment against the other defendants also.

APPEAL from the district court for Nuckolls county:
JOHN B. RAPER, JUDGE. *Reversed on condition.*

Stubbs & Stubbs and H. H. Mauck, for appellant.

Rich, Nolan & Woodland and R. D. Sutherland, contra.

SEDGWICK, J.

This case was first tried with a jury, and upon appeal to this court the judgment was reversed (89 Neb. 770),

and motion for rehearing was overruled (90 Neb. 736). Upon the second trial in the district court the jury were instructed to find in favor of the plow company and a verdict was rendered thereon. The plaintiff has appealed.

The second trial was upon the same pleadings and evidence. The evidence upon the former trial was read from the bill of exceptions. The question presented is as to the instruction in favor of the plow company. It is insisted that the former decision was that the plow company is not liable. Upon the first appeal it was held that, if upon this evidence the Murdocks were not liable, it could not be held that the plow company was liable. The verdict was therefore "in irreconcilable conflict with itself," as said in *Gerner v. Yates*, 61 Neb. 100, and approved in *Chicago, St. P., M. & O. R. Co. v. McManigal*, 73 Neb. 585, and for that reason it could not stand for any purpose, and so upon the motion for rehearing the judgment was reversed as to all defendants.

The expert Bartlett was responsible for the management of the machinery. Both the plow company and the Murdocks relied upon him as one having expert knowledge, and, under this evidence, if there was negligence which caused the injury, it was the negligence of Bartlett. The question was whether these defendants were responsible for his conduct. The answer of the jury in the first verdict was that the plow company was responsible for Bartlett's conduct of the demonstration, but that the Murdocks were not. The majority of this court thought that this verdict was inconsistent. The place of the demonstration was at or near the place of business of the Murdocks, a place selected by them. If this was a dangerous place for the purpose, they are not less responsible for that fact than is the plow company. The Murdocks were interested financially; they expected to reap profits from the sales which this demonstration would induce; they were present, had notice of the details of the arrangements and countenanced the proceedings, and undoubtedly had authority to stop them if bystanders were endangered

thereby. The plow company selected and recommended the expert, and was also financially interested, and although not present, and without notice of the details of the arrangements, it was not intended to hold, as matter of law, that the Murdocks might be liable and that the plow company was not. We are satisfied that this evidence shows conclusively that Bartlett was acting for both of these parties, and a verdict in favor of one party and against the other is inconsistent and cannot be allowed to stand.

We are constrained to add that there are unfortunate expressions in our former opinion which might mislead the most prudent trial court. The fault of this unfortunate mistrial is not with the trial court, nor yet necessarily with the writer of the former opinion, but is chargeable to the writer hereof and others of the majority who insisted upon certain expressions, without sufficient thought of inconsistencies caused thereby.

The record shows that the case was tried against all defendants, and, after the court had fully instructed the jury, the plow company asked for an instruction to find in its favor. The court thereupon so instructed the jury, and there was a verdict and judgment in favor of the plow company and against the plaintiff. From this judgment the plaintiff has appealed.

There is in the record no verdict or judgment upon the issues presented as against the other defendants. So far as this record shows, the action against the Murdocks is still pending. The plaintiff's attorney, however, stated upon the argument that the jury found a verdict in favor of plaintiff and against the Murdocks, and that, if this judgment in favor of the plow company was reversed, the judgment against the Murdocks would be set aside and vacated.

If the plaintiff, within 30 days, files in this court a certificate of the clerk of the district court showing that the judgment against all other defendants has been set aside and vacated, the judgment in this case in favor of

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the Moline Plow Company will stand reversed at the costs of the defendant, the Nebraska Moline Plow Company; otherwise the judgment will be affirmed.

REVERSED ON CONDITION.

REESE, C. J., concurring.

I concur in the decision and judgment in this case, but base my concurrence upon the final action of this court on the motion for rehearing as reported in 90 Neb. 736, in which the judgment against the plow company was reversed and the cause "remanded to the district court for a new trial, with leave to the plaintiff to proceed against both of the defendants." In my opinion this was a specific direction to the district court to proceed against both defendants by a new trial of all the issues involved in the case without reference to any suggestions or expressions contained in the opinion reported in 89 Neb. 770.

WILLIAM D. ARMSTRONG, APPELLANT, V. WILLIAM O.
GRIFFITH, APPELLEE.

FILED OCTOBER 17, 1913. No. 17,337.

1. **Taxation: FORECLOSURE OF LIEN: CONSTRUCTIVE SERVICE: VOID SALE: REDEMPTION.** Where jurisdiction in a tax foreclosure case is sought to be acquired by publication, there should be a strict compliance with the provisions of the statute; and, if the notice published is insufficient, a sale under it will be considered void in an action to redeem brought by one who holds the legal title.
2. ———: ———: ———: **SUFFICIENCY.** Where notice of publication was not addressed to the defendant, and the title of the case and the court in which it was brought were not set forth in the introductory paragraph of such notice, and it was not alleged in such paragraph that a petition had been filed, the service will be deemed insufficient because of the defects stated.

APPEAL from the district court for Keya Paha county:
JAMES J. HARRINGTON, JUDGE. *Reversed with directions.*

Allen G. Fisher, William P. Rooney and Andrew M. Morrissey, for appellant.

Lear & Lear, contra.

HAMER, J.

This is an appeal from the judgment of the district court for Keya Paha county. The plaintiff, William D. Armstrong, alleges ownership of the land in controversy as grantee of the Muscatine Mortgage & Trust Company, and sues to redeem from a sale made under a decree of foreclosure of alleged tax liens. He claims that the deed made under the foreclosure proceedings is void for want of any notice to the Muscatine Mortgage & Trust Company or any appearance by it. The defendant had judgment. The publication notice was not directed to the defendant in the foreclosure proceeding, the Muscatine Mortgage & Trust Company. For a notice to be a good notice by which jurisdiction is acquired, it should address the defendant or defendants intended to be served. It may be that no particular form is necessary, but the defendant intended to be served should be directly addressed or the name should be included in the title of the case contained in the notice. The notice is addressed, "Notice to nonresident defendants," without saying what are the names of the defendants. Nor does the notice read as such notices are sometimes made to read by publishing the title of the case at the head of the notice. Where that is done, and the names of the parties appear as plaintiffs and defendants, and the court is mentioned, it is apparent that the desire of the plaintiffs is to bring the defendants into court in the particular case mentioned.

Section 79 of the code as it existed at the time of the publication, and as it now exists, reads: "The publication must be made four consecutive weeks in some newspaper printed in the county where the petition is filed, if there be any printed in such county; and if there be not, in

some newspaper printed in the state, of general circulation in that county. It must contain a summary statement of the object and prayer of the petition, mention the court wherein it is filed, and notify the person or persons thus to be served, when they are required to answer." In this case the publication fails to mention the court wherein the petition has been filed, and leaves out the word "petition" in the first paragraph of the notice, so that that paragraph fails to allege that any petition has been filed in the district court for Keya Paha county, or anywhere else. The first paragraph of the notice reads: "You and each of you will take notice that on the 9th day of July, 1900, the county of Keya Paha, plaintiff herein, filed in the district court in and for the county of Keya Paha, and state of Nebraska, against Muscatine Mortgage & Trust Company, nonresident defendants, the object and prayer of which are to foreclose the tax liens hereinafter described." As the publication is not directed to the Muscatine Mortgage & Trust Company, the defendant to be served, and that company is not pointed out as the defendant intended, therefore the notice published cannot be a sufficient notice. These provisions of section 79 are mandatory, and, unless complied with, there is no jurisdiction.

Section 80 of the code as it existed when the publication was made, and as it still exists, reads: "Service by publication shall be deemed complete when it shall have been made in the manner and for the time prescribed in the preceding section; and such service shall be proved by the affidavit of the printer or his foreman or principal clerk, or other person knowing the same." As the publication was not made in the manner prescribed by section 79, the proof by affidavit fails, and there is no basis upon which to assume jurisdiction. This court has insisted on a strict compliance with the statute in cases of this character. It also has been inclined to place upon the statute such a liberal interpretation as its terms might warrant touching the right to redeem. *Smith v. Carnahan*, 83 Neb. 667.

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In Wade, Law of Notice (2d ed.) secs. 1135, 1136, it is, among other things, said: "In some of the states the original process by which the court obtains jurisdiction of the defendant is no longer styled a *writ of summons*, but is called simply a notice. * * * This process, being first in order, is also of primary importance in the institution of a suit either at law or in equity; for its due service, actually or constructively, is necessary to give the court jurisdiction either of the *defendant*, in personal actions, or of the *thing*, in actions *in rem*."

In *Pomeroy v. Betts*, 31 Mo. 419, it is said: "An order of publication, where there are nonresident defendants, may be made by the court (or clerk, in vacation), upon an allegation in the petition or an affidavit, alleging the fact of such nonresidence, and *directed to the nonresidents*, notifying them, etc.

"Where a statute directs the publication of a notice having reference to personal right or to property, the requirements of the statute are to be strictly pursued." 29 Cyc. 1119, under the heading "By Publication."

The judgment of the district court is reversed and that court directed to proceed in harmony with this opinion. The plaintiff should be allowed to redeem upon the payment into court for the benefit of the defendant of such sum as will pay the amount of the interest and taxes and value of improvements. *Hayes County v. Wileman*, 82 Neb. 669.

REVERSED.

ROSE and SEDGWICK, J.J., dissenting.

HENRY BURROUGHS V. STATE OF NEBRASKA.

FILED OCTOBER 17, 1913. No. 18,112.

Criminal Law: ARRAIGNMENT. Under section 448 of the criminal code, a conviction of a felony will not be sustained where the defendant enters his objection after the verdict, unless the record affirmatively discloses that the accused was arraigned, and that he pleaded to the information or indictment before the trial. *Barker v. State*, 54 Neb. 53; *Browning v. State*, 54 Neb. 203.

ERROR to the district court for Gage county: LEANDER M. PEMBERTON, JUDGE. *Reversed.*

S. D. Killen, for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton*, contra.

HAMER, J.

The plaintiff in error was tried in the district court for Gage county and found guilty of burglary in breaking into a car belonging to the Rock Island Railroad Company and in stealing therefrom ten sacks of sugar of the value of \$61, the property of Eugene S. Stevens. The petition in error alleges that section 448 of the criminal code was disregarded in the trial because the accused was not arraigned. That section reads: "The accused shall be arraigned by reading to him the indictment, unless, in cases of indictments for misdemeanors, the reading shall be waived by the accused by the nature of the charge being made known to him, and he shall then be asked whether he is guilty or not guilty of the offense charged." Attention is also called to that part of section 451 of the criminal code which provides: "If upon the arraignment the accused offer no plea in bar, he shall plead 'guilty' or 'not guilty;' but if he plead evasively, or stand mute, he shall be taken to have pleaded 'not guilty.'" This court in *Barker v. State*, 54 Neb. 53, held that section 448 of the

criminal code must be complied with and could not be disregarded.

In *Browning v. State*, 54 Neb. 203, the former opinion is followed by an exhaustive opinion containing many authorities. The opinions referred to were delivered by Judge NORVAL. Since the delivery of these opinions, the legislature has been in session several times and has not repealed the sections in question. If it had desired to repeal the same, it would no doubt have done so. It is argued with a considerable degree of force in the brief of the attorney general that the defendant could waive the statute, and that he has in effect done so by neglecting to raise the question before his trial and conviction. The sections quoted seem to place the burden upon the court to make a record and show that the provisions of section 448 have not been disregarded. In the face of these sections of the criminal code, we are without power to declare the trial a valid and proper trial, although we may feel that no actual injury has been done to the defendant.

In *Barker v. State*, *supra*, it is said in the fourth paragraph of the syllabus: "A conviction under an amended information charging a felony will not be sustained where the record does not affirmatively disclose that the accused was arraigned, and that he pleaded before trial."

In *Browning v. State*, *supra*, it is said in the third paragraph of the syllabus: "When it is discovered during the trial on the charge of a felony that there has been no arraignment and plea, the court should not proceed with the trial without arraigning the accused, entering his plea, and causing the jury to be resworn and the witnesses to be re-examined." In the body of the opinion in the *Browning* case it is said: "This court held, in *Barker v. State*, 54 Neb. 53, that it was indispensable to the validity of a conviction of a felony that the record affirmatively show the accused, before trial, was arraigned, and that he pleaded to the information or indictment, or, in case he stands mute or refuses to plead, that the court enter the plea of not guilty for him. A re-examination of the

question satisfies us that the conclusion then reached is sound and should be adhered to." The court then cites a long list of cases, after which it remarks: "There are a few decisions which hold that an arraignment and plea may be waived by the prisoner in all except capital cases, but such decisions, for the most part, were rendered under statutes different from ours." It is further said: "The object of requiring an arraignment and plea in a criminal case is to inform the accused of the nature of the charge against him, and to make up an issue for trial. Until a plea of not guilty is entered, there is no issue of fact for the jury to determine. * * * There can be no valid trial for a felony without an arraignment and plea before the trial is entered upon."

In Clark, Criminal Procedure, sec. 128, it is said: "In the arraignment the defendant must be called to the bar of the court, the indictment must be distinctly read to him, and he must be asked whether he pleads guilty or not guilty. If he stands mute, and obstinately refuses to answer, a plea of not guilty is entered for him by the court. * * * Not only is the arraignment necessary, but the plea is equally so, for without a plea there can be no issue to try."

In 2 Bishop, New Criminal Procedure (2d ed.) sec. 733, subd. 4, it is said: "Without plea, there can be no valid trial. It is so even though the defendant went voluntarily and without objection to trial, knowing there was no plea. It must be before the jury are sworn; afterward, the plea is too late."

If we apply the rule as above laid down to the instant case, it must be said that, as the defendant did not have the complaint read to him and did not plead to it, therefore no issue was ever tried.

In *Bowen v. State*, 98 Ala. 83, the court said: "The record nowhere shows that the defendant pleaded to the indictment, or that the court interposed the plea of 'not guilty' for him, or that issue was joined on plea." The judgment was reversed.

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In *People v. Corbett*, 28 Cal. 328, it is said: "A verdict, in a criminal case, where there has been neither arraignment nor plea, is a nullity, and no valid judgment can be rendered thereon."

In *Bowen v. State*, 108 Ind. 411, the court said: "Where the record in a criminal cause fails to disclose affirmatively that a plea to the indictment was entered, either by or for the defendant, such record on its face shows a mistrial, and that the proceeding was consequently erroneous, to say the least."

In *Parkinson v. People*, 135 Ill. 401, it is said in the first paragraph of the syllabus: "The arraignment and plea of the defendant * * * are essential to the forming of an issue, without which there is nothing to try, and nothing on which to base a verdict or judgment."

In *State v. Ford*, 30 La. Ann. 311, it is said in the syllabus "that a plea on his behalf should be filed to the indictment found against the accused, that the failure to file such a plea will vitiate the proceedings, and justify the setting aside of the verdict."

In *Jefferson v. State*, 24 Tex. App. 535, it is said in the body of the opinion: "It is nowhere made to appear that the defendant pleaded to the charge in the information, nor that a plea to the same was entered for him. Without a plea there was no issue to try."

In *State v. Vanhook*, 88 Mo. 105, it was said of the failure to arraign the defendant: "This is a fatal error, and it is for the legislature, and not for this court, to change the law on the subject."

In *Wilson v. State*, 42 Miss. 639, the court said: "The defendant cannot waive his arraignment, nor can he plead by attorney. The plea by attorney is no plea."

In *Crain v. United States*, 162 U. S. 625, it was said: "Until the accused pleads to the indictment and thereby indicates the issue submitted by him for trial, there is nothing for the jury to try."

So far as we have made an examination of the cases cited by the attorney general, there is a difference in the

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proceedings or a difference in the statute, so that the cases are not in point.

Section 448 of the criminal code is not applicable to indictments and informations for misdemeanors. The section itself specifically provides that the arraignment may be waived in such cases. That the legislature intended that there should be no waiver in case of indictments and informations charging felonies is apparent from the language of the section. If we disregard the expressed will of the legislature, we substitute the views of the court in place of the legislative enactment. This we decline to do.

In the face of the uniform holding of this court, supported as it is by the great weight of authority, we do not feel like overruling the decisions of the court contained in *Barker v. State* and *Browning v. State*, *supra*. The judgment of the district court is reversed and the case remanded.

REVERSED.

FAWCETT, J., concurring.

The language of section 448 of the criminal code is plain, unambiguous, and mandatory, and the construction placed upon it in *Barker v. State*, 54 Neb. 53, and *Browning v. State*, 54 Neb. 203, is clear and explicit. If the code is to be amended, such amendment should be made by the legislature, and not by the court.

SEDGWICK, J., concurring.

I concur in this decision solely because it seems to be required by the statute, which will admit of no other construction, and the statute was enforced in an early decision of this court which has been subsequently followed. Many courts that adopted such a technical rule in the absence of a controlling statute have since changed their views, and I think have done wisely in so doing. When the defendant is prosecuted by information and not by indictment, a copy of the information is required by our statute to be served upon him before the trial. He is al-

ways represented by counsel; there is nothing secret or hidden in the proceedings taken against him in open court, and if he goes to trial without objection, and does not ask for any further information as to the charge against him until after the trial is over, and he has been fully heard upon all matters alleged and urged against him, it seems unreasonable to set aside the whole proceeding upon an immaterial technicality. The court, however, is powerless to remedy the matter. The statute is unequivocal. It says (criminal code, sec. 448): "The accused shall be arraigned by reading to him the indictment." This is followed by the provision that, *in case of misdemeanor*, it may be waived by the accused. This provision, as a part of the same section, that it may be waived in misdemeanor cases makes it conclusive that the legislature's intention was that it could not be waived in felony cases, and, although this plain statute was reluctantly enforced by the court many years ago, the legislature is manifestly satisfied with the technical rule which it has established. No change and, so far as I know, no attempt to change the statute has been made. If the statute was at all ambiguous, and would admit of any other construction, the court might conclude that a rule more in harmony with the policy of the courts in modern times was intended by the legislature. But as it is, if the court should overturn this rule, it would be the rankest kind of judicial legislation. The decisions of courts in other jurisdictions where the legislature has not decided the matter are of no use in ascertaining the duty of this court under this statute and those long-standing decisions enforcing it.

LETTON, J., dissenting.

I most earnestly dissent from the conclusion in this case. It seems to me to be a blind adherence to a bad precedent, and that the court now has an opportunity to take a better stand.

The record shows that an information was filed charging the appellant with burglary; that a true and certified copy of the information was served upon the accused; and that at his request the case was continued to the next term of court. At the next term defendant again requested and procured a continuance, and at the next succeeding term the cause was tried. Instruction No. 2 states to the jury that the defendant "has been arraigned on said information and has pleaded not guilty," etc., but no journal entry shows this to be the case. Not until after the verdict of guilty had been rendered was the complaint made that he had not been arraigned. So far as the journal shows, the only thing lacking was the reading aloud of the information in open court, and the request for him to plead. The trial was conducted in all respects as if this had been done. I cannot agree to the doctrine that one who for months before the trial had been in possession of a copy of the information with the names of the witnesses indorsed thereon, who repeatedly requests and secures continuances, appears with his counsel on the day of the trial, takes part in selecting and impaneling the jury, and thereafter produces witnesses in his own behalf, and submits his case to the jury after argument by his counsel, has not waived the formality of having the information read to him and an entry made by the court that he pleaded not guilty, or stood mute. It seems to me that such a rule permits and encourages trifling with the administration of justice. Of course, the reason for arraignment is to let the accused be fully informed as to the charge which he is called upon to meet, but this had already been done by the service of the information upon him. The accused has suffered no injury to any substantial right, and his conviction should not be set aside for the lack of such an empty form. The more modern and better rule is announced in a very recent case in Michigan, *People v. Weeks*, 130 N. W. 697 (165 Mich. 362): "The presence of accused in court through a trial of a felony case upon the merits, repre-

sented by counsel, who failed to call attention to the omission of arraignment and plea, was a waiver of accused's right thereto."

It is true that in the *Browning* and *Barker* cases this court, some 15 years ago, adhered to the doctrine established in the days when the accused seemed to have no rights, when the whole machinery of the law seemed designed for the purpose of conviction, and when courts were prone to establish technical rules, and require strict compliance therewith, in order to aid persons probably innocent, but handicapped in their defense, and subject to harsh punishment out of all proportion to the gravity of the crimes charged. But, the more modern and sounder doctrine also finds support in this court in the case of *Allyn v. State*, 21 Neb. 593. It is true that the conviction was for a misdemeanor, but in support of the decision the case of *State v. Greene*, 66 Ia. 11, where the accused was convicted of a felony, is quoted from at length, apparently with approval, and Maxwell, Criminal Procedure, p. 541, is also quoted, a portion of the excerpt being as follows: "A party who personally and by his counsel voluntarily goes into court, practically on a plea of not guilty, should not, after verdict, be permitted to assign as a reason for setting aside the verdict that he was not asked to say whether he was guilty or not guilty before the trial. He has had the benefit of the plea of innocence in his favor and has been prejudiced in no right." Before the *Barker* case was decided, many courts took the contrary view to the rule then stated. Since that time other courts have seen the light and have declined to adhere to decisions so contrary to the spirit of the reformed procedure.

The supreme court of Wisconsin, in *Hack v. State*, 141 Wis. 346, directly overruled several cases in that state holding to the ancient rule. In the opinion of Chief Justice Winslow, and the concurring opinion of Justice Marshall, sound and weighty reasons are given for the decision. I commend a reading of these opinions to those interested in the question.

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It is given, in the majority opinion, as one of the reasons for the conclusion that the sections of the criminal code prescribing that the accused shall be arraigned, and the manner of entering his plea to the indictment, have not been repealed, though the legislature has been in session several times since the *Barker* and *Browning* cases were decided. This argument is fallacious. No one contends that these sections should be repealed. They apply to the trial of all classes of criminals subject to prosecution by indictment, but the accused, at least in cases not capital, should be held to have waived these, as he may other requirements of the criminal code.

WALTER J. DAMRON, APPELLEE, v. MARY E. NOBLES,
APPELLANT.

FILED OCTOBER 31, 1913. No. 17,072.

Sales: BILL OF SALE: CONSTRUCTION: REVIEW. A written bill of sale, which described the property sold as "all of the furniture and furnishings in all the rooms (except room No. 10, and except one carpet and one bed) on the second and third floors of the building, No. 229 North Eleventh street," was construed by the district court as reserving all the furniture in room numbered 10, and, in addition thereto, reserving a carpet and bed in other parts of the house; that the only ambiguity was in the identification of the carpet and bed so reserved, and to which, over defendant's objections, the proof was limited upon the trial. *Held*, That under the oral evidence it does not sufficiently appear that the holding was erroneous.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed*.

Talbot & Allen, for appellant.

R. H. Hagelin and *F. C. Foster*, contra.

REESE, C. J.

This is an action in replevin whereby plaintiff seeks

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the possession of a "brass bed and one carpet, a green Wilton rug, 12x15 feet, of the value of \$30." It is to be inferred, though not shown by the record, that the suit was commenced in one of the courts having justice of the peace jurisdiction, and taken on appeal to the district court, where a jury trial was had, resulting in a verdict and judgment in favor of plaintiff. Defendant appeals.

It appears from the record before us that, on and prior to the 29th day of December, 1909, plaintiff was conducting a rooming house in the city of Lincoln, and on that date consummated a sale of certain of the furniture and furnishings therein to defendant. A bill of sale was prepared, signed by plaintiff and his wife, and delivered to defendant, who, on the first of January following took possession. The property sold is described in the bill of sale as "all of the furniture and furnishings in all the rooms (except room No. 10, and except one carpet and one bed) on the second and third floors of the building, No. 229 North Eleventh street, Lincoln, Nebraska, together with the sign on the front of said building, as set out in the inventory attached hereto and made a part hereof." There is no inventory attached to the contract shown in the record, nor is there any proof as to the floor on which room numbered 10 is situated. The result of the suit hangs upon the construction to be given to this description of the property sold. It is conceded by both parties that the description is ambiguous. By reason of that ambiguity the parties are involved in this suit, which must be a losing one to both. It is claimed by plaintiff that all the furniture and furnishings in room numbered 10 are reserved to plaintiff, and in addition thereto a carpet and bed "on the second and third floors" of the building, while it is insisted by defendant that the contract should be so construed as to except only the carpet and bed in room numbered 10. The trial court apparently adopted the view that there was no ambiguity in the provisions regarding the contents of room numbered 10, holding that all in that room was reserved, that there was no

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ambiguity in the clause reserving a carpet and bed, but that the ambiguity was as to which particular carpet and bed were reserved. The jury were instructed, "as a matter of law, that the bed and carpet *sold* would be one not contained in room No. 10;" that they were to determine by their verdict "whether the bed and carpet replevied are the ones agreed upon by the parties as the ones reserved by the plaintiff;" that, if they were, the finding should be in his favor; thus shutting out all defenses except that one question. Accepting the language of this carelessly and defectively written description of the property intended to be sold as that which is to govern, we cannot say but that the holding of the court was correct, although the testimony was conflicting. On the day preceding the one on which the contract was executed, and on the day when defendant, with plaintiff, inspected the property to be sold, and when the alleged reservation was first orally made, plaintiff gave written instructions to his agents to sell his entire holdings in the rooming house, saying, "We reserve the furniture in the room now occupied by us. Will give immediate possession on delivery of the bill of sale and receiving the \$500 and secured papers for balance," etc. The price in this written authority was \$1,400, and the sale was made for \$1,435. The reservation contained in this written authority of the room occupied by plaintiff referred to room numbered 10, and no other or different one. This paper, however, was excluded by the court, on the ground that it was sought thereby to vary the terms of the contract. There was no error in this ruling.

While the writer does not fully agree with the holding of the trial court, it is probable, all things considered, that the court did not err, and that the judgment should be affirmed, which is done.

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

WILLIAM HOLLINRAKE, APPELLANT, v. JOHN F. NEELAND
ET AL., APPELLEES.

FILED OCTOBER 31, 1913. No. 17,437.

Injunction: REMEDIES AT LAW: POSSESSION OF REAL ESTATE. A litigant cannot successfully invoke the extraordinary remedy of injunction, the effect of which would be to obtain possession of real estate, unless the facts and circumstances in the case are such that his ordinary legal remedies are inadequate.

APPEAL from the district court for Dawes county:
WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Allen G. Fisher and William P. Rooney, for appellant.

Edwin D. Crites, contra.

BARNES, J.

This action was commenced in the district court for Dawes county to obtain an injunction restraining defendants from trespassing upon a certain tract of real estate situated in that county. A temporary injunction was allowed, but upon the final trial of the cause the injunction was dissolved and the plaintiff's action was dismissed. Exceptions were taken, and plaintiff has appealed.

Among other errors complained of, it is contended that the court erred in permitting defendants to answer while in contempt for a violation of the temporary order of injunction. It is a sufficient answer to this assignment to say that there seems to be no adjudication in the record that defendants were guilty of a violation of the injunction. Again, it was in the discretion of the district court to allow defendants to file an answer to plaintiff's petition, and it is not claimed that the court abused its discretion.

The other assignments of error may be disposed of under the general contention that the court erred in giving the judgment against the plaintiff.

It appears from the record that plaintiff, in April, 1901, leased the half section of land on which the alleged trespass was committed from the state, the same being known as school land; that the rest of the school section was leased from the state by defendant John F. Neeland (the other defendants having disclaimed any interest or liability to the plaintiff in this action); that the land upon which the alleged trespass was committed was uninclosed prairie land, without trees or cultivation of any kind, and was wholly in a state of nature; that it was entirely surrounded by the land owned or leased by defendant; and it also appears that it was leased of the plaintiff by the defendant about the year 1901, who took possession of it, and who appears to have held over under his lease up to the time of the commencement of this action; that defendant has paid the rent reserved by plaintiff in full up to the month of June, 1910, either voluntarily or by the payment of a judgment recovered by plaintiff in the justice court of said county. Plaintiff claimed that he had terminated defendant's lease prior to the commencement of this action by serving him with a notice to quit; but the record contains no competent evidence tending to establish that fact. It is not claimed that plaintiff was in actual possession of the land, but it is insisted that he was entitled to such possession. It clearly appears that the land in question was surrounded by a large body of other land owned or leased by the defendant, which is inclosed by fences and was used as a pasture for defendant's cattle; that defendant has never driven nor herded his cattle upon the plaintiff's land; but it seems clear that defendant's stock has, at will, run thereon. Upon this evidence the district court held that plaintiff was not entitled to invoke the aid of a court of equity to restrain the alleged trespass.

The land in question was actually in the possession of the defendant. It was within the inclosure used by him as a pasture for his cattle. Plaintiff had leased it to the defendant for a year, and plaintiff says that defendant held

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it from year to year thereafter. Plaintiff had received the rents and profits therefor up to June, 1910, and this suit was commenced in July of that year. Even if defendant's possession of the land was wrongful, the plaintiff was not entitled to an injunction, the effect of which would be to remove him therefrom, in the absence of a showing that the ordinary remedies at law, such as ejectment, or forcible detainer, would be unavailing. There seems to be no reason why one or the other of those remedies could not have been employed in the case at bar.

For the foregoing reasons, it is apparent that the judgment of the district court was right, and it is therefore

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

**ELEONORE BUTSCHKOWSKI, APPELLANT, v. WILLIAM
BRECKS, APPELLEE.**

FILED OCTOBER 31, 1913. No. 16,632.

1. **Courts: CONSTITUTIONAL LAW: TREATIES.** Under section 2, art. VI. constitution of the United States, "all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby; anything in the constitution or laws of any state to the contrary, notwithstanding."
2. **Pleading: JUDICIAL NOTICE: TREATIES.** State courts will take judicial notice of the existence of a treaty, and if its provisions are self-executing it is unnecessary to plead its existence.
3. **Appeal: QUESTIONS REVIEWABLE.** Questions presented as to the rights of the husband of a deceased nonresident alien in lands lying in this state not having been presented or decided in the district court will not be decided here, but the cause will be remanded for further proceedings.

APPEAL from the district court for Frontier county:
ROBERT C. ORR, JUDGE. *Reversed with directions.*

S. L. Geisthardt, L. H. Cheney and E. P. Pyle, for appellant.

W. S. Morlan and Lambe & Butler, contra.

LETTON, J.

The plaintiff brought this action seeking to partition certain lands in this state. She alleged that Frederick Brecks, the owner of the land, died intestate leaving surviving him as his only heirs the plaintiff, who is his sister, and the defendant, William Brecks, his brother, a resident of this state; that by the laws of this state the property descended to the heirs at law, and that she claims an undivided half interest in the land as one of the heirs. The defendant answered that the plaintiff is a nonresident alien, a citizen and resident of Prussia, and therefore had no interest in the land. Plaintiff replied admitting that she was a nonresident alien, as alleged. A motion for judgment on the pleadings was filed and argued, and the case taken under advisement. An amended reply was then filed without leave of court, pleading a treaty between the United States and Prussia, by the terms of which citizens of Prussia are entitled to sell and withdraw the proceeds of real estate which they would inherit if citizens of the United States. At the next term there was filed a motion to strike the amended reply, which was sustained for sufficient reasons. In passing upon the motion for judgment on the pleadings, the court stated the issues as above, and said: "In this condition of the pleadings there was no attempt on the part of the plaintiff to claim under or by virtue of any treaty or other agreement in any way superseding said statute; but, on the contrary, the petition discloses that she claimed only under the laws of this state. The motion of defendant for judgment on the pleadings is, therefore, sustained." The plaintiff's cause of action was then dismissed, and the title was quieted in the defendant. An appeal was perfected to this court. The plaintiff afterwards died. A motion was

made to revive the cause in the name of Herman Butschkowski, the husband of the deceased, which was sustained and the cause revived, leaving the question open as to the property right of the survivor. *Butschkowski v. Brecks*, 93 Neb. 604.

We will first consider whether the court erred in its judgment on the pleadings. This seems to depend upon whether the court will take judicial notice of the existence of a treaty between the United States and Prussia, or whether it is necessary for one who seeks to take advantage of the provisions of a treaty to plead the same.

Section 2, art. VI, constitution of the United States, declares: "This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby; anything in the constitution or laws of any state to the contrary, notwithstanding."

It has been repeatedly declared that treaties are the supreme law of the land, and that a self-executing treaty requires no legislation to put it into operation. *Yeaker's Heirs v. Yeaker's Heirs*, 4 Met. (Ky.) 33, 81 Am. Dec. 530; *Cunard Steamship Co. v. Robertson*, 112 U. S. 580, 5 Sup. Ct. Rep. 247. And statutes have often been declared void so far as in opposition to the terms of a valid treaty. *Baker v. City of Portland*, 5 Saw. (U. S. C. C.) 566; *Fisher v. Harnden*, 1 Paine (U. S. C. C.) 55. A treaty giving citizens of a foreign country the right to take lands by descent in this country is superior to and controls any state legislation against the holding of lands by aliens. *Kull v. Kull*, 37 Hun (N. Y.) 476; *Hauenstein v. Lynham*, 100 U. S. 483; *In re Stixrud's Estate*, 58 Wash. 339; *Minnesota Canal & Power Co. v. Pratt*, 101 Minn. 197, 232. See, also, a full collection of cases on this subject contained in Ann. Cas. 1912 A, 1101, annotating *Ahrens v. Ahrens*, 144 Ia. 486.

In *Cunard Steamship Co. v. Robertson*, *supra*, the

court, after quoting the constitutional provision before referred to, say: "A treaty, then, is the law of the land as an act of congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute."

Schultze v. Schultze, 144 Ill. 290, 19 L. R. A. 90, was an action for partition. The complainant was a resident of Bremen, and several of the defendants were citizens of this country. One of the defendants answered that the complainant was a nonresident alien, and that by a statute of Illinois such an alien was not capable of acquiring title to the lands in that state. So far as the report shows, no reference was made in the pleadings to the existence of a treaty. Both the lower court and the supreme court of Illinois held that, under the treaty, the plaintiff could recover, and that its effect was to suspend for three years the operation of the alien law of Illinois, so that non-residents might dispose of the property and withdraw the proceeds. It will be seen that the pleadings in that case are substantially the same as in the case at bar. See, also, *Ex parte McCabe*, 46 Fed. 363, 373; Bliss, Code Pleading (3d ed.) sec. 185.

We reach the conclusion that it was no more necessary to plead the terms of the treaty than it would be to plead the terms of a domestic statute, or a provision of the constitution of this state or of the United States. Article XIV of the treaty of 1828 between the United States and Prussia provides: "And where, on the death of any person holding real estate within the territories of the one party, such real estate would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject shall be allowed a reasonable time to sell the same, and to withdraw the proceeds without molestation and exempt from all duties of detraction, on the part of the government of

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the respective states." When the facts brought the case within the provisions of this treaty, it was the duty of the court to enforce its terms just as fully as those of a statute of the state. In so far as the local statutes are in conflict with the treaty, the provisions of the treaty must govern. We are satisfied, therefore, that the court erred in entering judgment upon the pleadings against the plaintiff.

A further question, however, has arisen since the death of plaintiff. Her husband is in this court setting up a property right in the land by virtue of a paper in the nature of an agreement between husband and wife with respect to the descent of their respective separate property. It is unnecessary to set out the instrument at length. Nothing has been produced showing that the instrument is of any validity, or that it can operate in any manner to transfer the property rights of Mrs. Butschkowski in the real estate to her husband on her decease. Furthermore, an affidavit in the record on the motion to revive seems to show that the plaintiff died in 1911. By section 1 of the decedent act of 1907 (laws 1907, ch. 49: Ann. St. 1907, sec. 4901), the real estate of deceased persons shall descend: "Fourth. One-half to the husband or wife if there be no child, nor the issue of any deceased child or children, surviving. Fifth. If the deceased leave relatives of his or her blood, the residue of the real estate of which he or she shall die seized, in the cases above named, when not lawfully devised, shall descend subject to the rights of homestead, in the same manner and to the same persons as hereinafter provided for the descent of real estate of deceased persons leaving no husband or wife surviving." Under these provisions of the statute, it may be that the husband of deceased is entitled to a portion of the real estate in controversy by descent. The questions as to the effect of the writing mentioned or as to the heirship of the husband are not before us, but should be presented in the proper forum.

For these reasons, we deem it proper to reverse the judgment and remand the case to the district court, with

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directions to permit the parties to make up issues as to the property rights of the husband, and to take such other steps as may be deemed necessary to establish the same, if any he may have.

REVERSED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

CARR & NEFF LUMBER COMPANY, APPELLEE, v. PETER
KROGH, APPELLANT.

FILED OCTOBER 31, 1913. No. 17,353.

Mechanics' Liens: TIME FOR FILING. Where a tenant, in June, 1909, purchased, under authority previously given by his landlord, material for the erection of a barn and the repair of a house and fence upon the landlord's property, which material was furnished in that month, the fact that in the latter part of September the landlord authorized the purchase of other material to be, and which was, used in making a potato cellar does not operate to extend the time for filing a lien for the material furnished in June to four months from the last delivery under the September contract.

APPEAL from the district court for Morrill county:
HANSON M. GRIMES, JUDGE. *Affirmed as modified.*

Williams & Williams, for appellant.

G. J. Hunt, contra.

LETTON, J.

Action to foreclose mechanic's lien. The petition alleges that between June 12, 1909, and November 8, 1909, the plaintiff, under a verbal contract, delivered to defendant certain building material to be used in the construction and repair of a dwelling house, barn, potato cellar, and other buildings upon defendant's premises; that a lien was duly filed within four months of the time

of furnishing the material. An itemized account is attached to the petition. The defendant denies that he ever bought or ordered of plaintiff, or that he was ever furnished, any lumber or building material of any kind prior to the 28th of September, 1909, but admits that the material alleged to have been purchased from that time to November 8, 1909, inclusive, was sold and delivered to him. He admits the filing of the lien, and pleads that he was then indebted to plaintiff in the sum of \$97.70, which he has since fully paid.

The real controversy seems to be as to whether the purchase of the items furnished before September 28 was authorized by the defendant. It is undisputed that the material furnished was used in making improvements upon defendant's farm. The testimony shows that plaintiff furnished the material at the request of one Farmer, who was defendant's lessee. Farmer testifies that at the time he leased the land Krogh directly authorized him to procure the material used in building the barn and repairing the house and fences upon the farm. These items were all furnished in June, 1909. This is corroborated by other witnesses, who testified, with respect to admissions made by Mr. Krogh, that he had told Farmer that he would stand good for the lumber and material he got that was necessary to use on the place. There is other testimony that, when presented with a bill for the whole amount of material furnished, he said: "That is all right; he had given Mr. Carter an order for some lumber, and when he got through with it he would settle the whole thing." While denying authority to Farmer to buy the specific items in the bill, Krogh himself testifies: "I did tell Mr. Wiggins at that time that I had told Mr. Farmer I would pay for all the lumber he had ordered that was necessary on the place." There seems to be no dispute but that all material ordered was used upon the farm. The only other matter that is in controversy is whether the material furnished in June was furnished under a separate contract from that furnished in September. If so, then the

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purported lien filed upon the premises was filed more than four months after the furnishing of the material, and is therefore void.

While we agree with the district court, upon conflicting evidence, that the purchase of the material in June was authorized by Mr. Krogh, still we find no evidence in the record that authority was then given to Farmer to purchase material for the potato cellar. The undisputed testimony shows the material for the house, barn and fence was all that was embraced in the June contract. This being so, we are of opinion that the four months' time in which to file a lien for the June bill expired before December 31, 1909, when the lien was filed, and that the court erred in holding that a lien attached for the amount of the June bill, since all other items are shown to have been paid.

The judgment and decree of the district court is therefore modified by setting aside that portion which finds that plaintiff is entitled to a lien upon the premises, but in all other respects the judgment is affirmed; all costs in this court taxed to appellee.

AFFIRMED AS MODIFIED.

REESE, C. J., BARNES and HAMER, JJ., not sitting.

OSCAR TALCOTT, APPELLANT, V. CHARLES W. RICE ET AL.,
APPELLEES.

FILED OCTOBER 31, 1913. No. 17,370.

Malicious Prosecution: DIRECTING VERDICT: EVIDENCE. In this an action for malicious prosecution, the district court directed a verdict for defendants and dismissed the action. *Held*, That since the evidence fails to disclose the existence of malice or the want of probable cause the judgment was right.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Affirmed*.

Nelson C. Pratt, for appellant.

W. W. Slabaugh, contra.

LETTON, J.

This is an action for malicious prosecution. In 1909 the plaintiff was the owner of a pool hall in the village of Valley, the defendants Coy, Byars and Butts were members of the board of trustees, and defendant Rice was marshal of that village. The petition charged that the defendants caused a complaint to be filed against the plaintiff in the county court of Douglas county, which contained three counts, the first two charging him and two others with unlawfully keeping intoxicating liquor for the purpose of sale without a license, and a third count charging that about March 12, 1909, the plaintiff and the same persons unlawfully sold to one James Snodgrass one quart of whiskey without having obtained a license; that the complaint was signed and sworn to by the defendant Rice on the advice and connivance of the other defendants maliciously and without probable cause; that they caused a warrant to issue and the plaintiff to be arrested; that plaintiff appeared for a preliminary examination, and that after a full and complete hearing he was acquitted and discharged. He avers that he was innocent of the charges, and that he has been greatly injured in his credit and reputation, and has been damaged in the sum of \$7,000.

The answer of each defendant pleads his official station, his duty to maintain the peace and dignity of the village and to enforce the laws and ordinances of the village relating to the sale of malt, spirituous and vinous liquors, and that the complaint was filed with probable cause and without malice. After the evidence had been adduced, the district court, on motion of defendants, directed the jury to return a verdict in their favor, which was done and the cause dismissed at the plaintiff's cost. The motion for a new trial and assignments of error made

here are substantially for the reasons that the court erred in directing a verdict, and in excluding evidence that the reputation of the witness Snodgrass for truth and veracity was bad at the time he made certain statements to the defendant Byars.

The question which lies at the root of the whole matter is whether the evidence was sufficient to require the submission of the case to the jury.

The undisputed testimony shows that plaintiff conducted a pool hall in the village from November 13, 1908, to April 20, 1909. In connection with the pool hall he sold confectionery, cigars and soft drinks, and had a card table at which chips were used in playing. In March, 1909, a complaint was sworn to by one Harrier and a search warrant issued against plaintiff, but the officers found no liquor except a small amount of whiskey in a quart bottle. This complaint was dismissed for a defect therein. A second complaint was filed and sworn to by Harrier. Defendant Rice, as marshal, was the official who made the search. He arrested defendant on that complaint, but found no liquor at that time, and the defendant was discharged. A third complaint was filed that day by Rice himself, which is the prosecution on which this action is founded, charging Oscar Talcott, Peter Sawyer and Joseph Loretz, instead of Talcott alone. A hearing was had upon this latter complaint, and the defendants were discharged for want of probable cause.

Plaintiff testified that he had not kept liquor for sale in the pool hall, nor at any other place, and that he did not sell intoxicating liquor in the pool hall nor authorize anyone to sell liquor for him, and quite a number of witnesses testified to being in the pool hall and seeing no liquor sold there. On the other hand, the defendants each testified to many complaints being made that liquor-selling and gambling were going on at the pool hall. Mr. Byars testified that he saw a great many beer and whiskey bottles about the pool hall in the alley or back street; that a number of citizens of the village were complaining

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that there were open violations every day, and that he was not doing his duty in failing to prosecute; that one James Snodgrass, a young man about 19, who had been working for Talcott, made a statement that he could give testimony that the law was being violated; that Snodgrass made a written statement and affidavit to that effect, and that one Carlson, one of the witnesses to the statement, said he could make a similar affidavit and would testify to the same effect; that other persons told him they saw a number of men come out of Talcott's place on Sunday so drunk they could hardly walk. He testified, also, to other suspicious facts coming under his own observation. Defendant Butts testified to seeing the statement made by Snodgrass, and of numerous complaints as to liquor-selling by Talcott made by other citizens. Defendant Coy testified substantially to the same purport. Each of the defendants testified that his action was without malice and in performance of what he believed to be his duty as an officer of the village.

James Snodgrass testified specifically to illegal sales by Talcott. A strong attack is made upon the credibility of his testimony, on the ground that the witness is of weak intellect and that no credence can be placed in his statements or testimony, and facts which strongly impeach his truthfulness were developed at the trial. Error is predicated upon the exclusion of evidence that the reputation of this witness for truth and veracity was bad at the time he made the statements to Byars. We think it unnecessary to consider this assignment. In considering the case, we have treated his evidence as if he had been successfully impeached.

The question remains whether, after disregarding the testimony of Snodgrass, there is sufficient in the record to show that the defendant as public officers had reasonable grounds to believe that the plaintiff had been guilty of the unlawful sale of liquor by himself or by his agents and servants. The testimony on rebuttal of a number of the witnesses for the plaintiff himself throws some light

on the question. One of these witnesses, after testifying he never bought any liquor in the pool hall, said: "I was in there one morning when the talk was had about the town being dry, and Sawyer walked to the back room, and I followed him, and there were two bottles of beer there that we drank. Talcott was not there." Another testifies that he was intoxicated in the pool hall, but also says that he got the liquor at Elkhorn and had it with him when he went into Talcott's; that the only time he ever drank at Talcott's was the time he was taken by Sawyer into the back room. Another witness testifies that he was in Talcott's one day when a Mr. Hixon came in with a bottle of beer, and said, "Have some?" that at the time he drank this beer there were several bottles in the back room; that Hixon said it was his, that he shipped it in. Sawyer says that he worked for Talcott in the pool hall; that he had a case of beer shipped in; that he took a number of persons into the back room and each drank a bottle; that he had the beer come in Talcott's name so that it would come to the pool hall and he could take it home. Talcott also testifies that he saw the case of beer that Sawyer brought there, and that at that time it only had five or six empty bottles in it; that Sawyer told him that it came in his name; and he told him not to do it again; that Sawyer was in charge of the pool hall.

From all the testimony in the record we are satisfied that there were circumstances shown as to the manner of conducting the pool hall which, even if possibly they led to a wrong conclusion, were enough to justify the village authorities in attempting to stop the illegal sale of intoxicating liquors in the village; and that the evidence upon which they acted would indicate to an ordinary mind that much of the liquor was being procured at Talcott's pool hall. The testimony also shows that reputable counsel was employed and the action of defendants was taken under his advice. Considering all the testimony, while the suspicious circumstances were perhaps susceptible of explanation, we are satisfied that a case has not

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been made as to the existence of malice or want of probable cause.

The district court properly directed a verdict for defendants, and its judgment must be, and is,

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

**ANNIE MCNEILL ET AL., APPELLANTS, V. MATTHIAS
SCHUMAKER, APPELLEE.**

FILED OCTOBER 31, 1913. No. 17,380.

1. **Mortgages: FORECLOSURE: REDEMPTION: LIMITATIONS.** Where the purchasers at a foreclosure sale, which is claimed to be void on account of defective proceedings, took actual possession, claiming title, and they and their grantees have held the same adversely for more than ten years after the attainment of their majority by the heirs of the mortgagor, the right to redeem from the mortgage and to recover the possession of the land is barred.
2. **Limitation of Actions: INFANTS: TOLLING THE STATUTE.** "The fact that certain of the plaintiffs in such an action are minors, who claim title through descent, does not toll the statute, where it appears that the statute had commenced to run during the lifetime of their ancestors." *Lyons v. Carr*, 77 Neb. 883.

APPEAL from the district court for Platte county:
GEORGE H. THOMAS, JUDGE. Affirmed.

Allen G. Fisher, William P. Rooney and Andrew M. Morrissey, for appellants.

John J. Sullivan, James Rait and Reeder & Lightner, contra.

LETTON, J.

This is an action to quiet title and to redeem from a mortgage lien. Thomas O'Neill died in September, 1886, seized of 240 acres of land. Plaintiffs are his widow and

heirs. The tract of 160 acres involved in this case, with 80 acres more involved in the case of *McNeill v. Storitx*, p. 547, *post*, comprised the tract upon which O'Neill and his wife, now Anna McNeill, executed the mortgage of which redemption is sought. In 1889 the mortgage was foreclosed in an action in which the widow and heirs were made parties defendant. An order of sale was issued and the land sold to Messrs. Sullivan and Reeder on December 28, 1889. The sale was confirmed on January 27, 1890, and a sheriff's deed executed and delivered to the purchasers, which was recorded on January 28, 1890. The purchasers immediately thereafter took possession of the property, and they and their grantees have continued in the sole, open and notorious possession of the same, claiming to be the exclusive owners, ever since, paying all taxes, and making valuable improvements thereon.

The plaintiffs allege that the proceedings to foreclose the mortgage were defective and void, and that the sale was unauthorized for a number of reasons. The defendant contends that the foreclosure and sale were regular in all respects, but the only defense which it is necessary to notice is that the action is barred by the statute of limitations. The petition alleges that when the father died in September, 1886, John was of the age of 10 years and Charles was 8 years of age; that Delia was born March 6, 1883; that Mary was born in August, 1880, and Willie in May, 1886; that Mary married one Cave, and died August 1, 1900, leaving two children, the plaintiffs Ora May and Vern Cave. By these allegations it is shown that John O'Neill became of full age in 1897, and Charles became of full age in 1899. The evidence of the mother shows that Delia was born on March 6, 1882, instead of 1883, as alleged; she, therefore, attained her majority on March 6, 1900. It is also shown that Willie died in 1891, aged five years. The mother also testified that her daughter Mary was married four or five years before she died. This seems to be the only testimony in the record in regard to the date of her marriage. Under the statute her minority

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terminated upon her marriage, which was at least four years before August, 1900. At that time the grantees in the sheriff's deed and their grantees had been in the actual, open and notorious possession for five or six years, claiming title. Even if we should consider that the statute did not begin to run as to Mary until she was 18 years old, instead of at her marriage, this event occurred in August, 1898; ten years from that time, or August, 1908, would be the latest date upon which a suit could have been begun by her if she still lived. She died in 1900, leaving two minor children, who are plaintiffs in this case.

It is an established principle that where the statute of limitations has begun to run before the death of a person then entitled to maintain a suit for possession, his death does not toll the statute, but it continues to run as against his heirs. *Hardy v. Riddle*, 24 Neb. 670; *Ballou v. Sherwood*, 32 Neb. 666; *Lyons v. Carr*, 77 Neb. 883. No action, therefore, would lie on the part of the Cave heirs after August, 1908. To recapitulate, the statute had run against Mrs. McNeill in 1900, against John in 1907, against Charles in 1909, against Delia on March 6, 1910, and against Mary and her heirs in August, 1908. This action was begun in November, 1910, more than 10 years after the disability of each of the surviving children and heirs of Thomas O'Neill had ceased, and more than 10 years after the statute had begun to run as against Mrs. Cave and her children. The evidence also shows that Mrs. McNeill had always asserted to the children and family that her rights in the land had never been barred, yet, with this knowledge, none of them had ever sought to disturb the hostile possession of the defendant or his grantors. While it would seem from a cursory examination of the record that the court had full jurisdiction in the foreclosure proceedings, we think it unnecessary to consider this matter, for the reason that, even if all the proceedings were void for want of jurisdiction, the right to redeem or recover the land was barred before the present action was begun.

McNeill v. Storitz. Shackelford v. Zimmerman.

The judgment of the district court must, therefore, be

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

ANNIE MCNEILL ET AL., APPELLANTS, v. JOHN STORITZ,
APPELLEE.

FILED OCTOBER 31, 1913. No. 17,379.

APPEAL from the district court for Platte county:
GEORGE H. THOMAS, JUDGE. *Affirmed.*

Allen G. Fisher, William P. Rooney and Andrew M. Morrissey, for appellants.

John J. Sullivan, James Rait and Reeder & Lightner, contra.

LETTON, J.

This is a sister action to *McNeill v. Schumaker*, ante, p. 544, brought to recover 80 acres of the original 240-acre tract. The conclusion reached in that case determines the disposition of this. The judgment of the district court is

AFFIRMED.

HARRY W. SHACKELFORD, APPELLANT, v. FRANK ZIMMERMAN, APPELLEE.

FILED OCTOBER 31, 1913. No. 18,108.

Intoxicating Liquors: LICENSE: PETITION: RESIDENT. If otherwise qualified, it is not essential that the signer of a petition for a liquor license has resided in a village for the length of time required to make him a legal voter. It is essential that there be a residence in good faith, and not merely a temporary residence for the purpose of signing the petition.

APPEAL from the district court for Sarpy county:
HARVEY D. TRAVIS, JUDGE. *Affirmed.*

Harry W. Shackelford, pro se.

James T. Begley and E. C. Page, contra.

LETTON, J.

This is an appeal from an order of the district court affirming the action of the village board of Springfield granting the applicant, Frank Zimmerman, a license to sell intoxicating liquors.

At the hearing it was stipulated that all the 31 names which appear upon the petition were upon the petition at the time of filing, except that of Mrs. Fackler, which was added on April 28, 1913; that the remonstrator is a practicing attorney of Omaha, and has never lived in Springfield or in Sarpy county; that at the last preceding municipal election the question of license or no license was submitted to a vote of the electors and the license proposition carried by the requisite legal vote.

The principal objections made are that sufficient notice of the hearing was not given, and that 30 qualified freeholders had not signed the petition. It appears that when the notice was published 30 names were signed to the petition. After the publication had been begun one signer withdrew his name, but before the license was granted the name of another qualified signer was affixed. This was sufficient. *Livingston v. Corey*, 33 Neb. 366; *In re Hartwig*, 91 Neb. 779.

After allowing the withdrawal, the names of 30 persons were left on the petition at the time of the hearing. It was stipulated that 22 of the signers were resident freeholders. This left only 8 persons whose qualifications were in dispute, whose names were numbered respectively, 1, 3, 4, 14, 20, 23, 24, 27, as they appear in the petition. The county clerk and *ex officio* register of deeds was called and asked whether he had made an examination of the

deed records of the county for the purpose of ascertaining whether or not real property in the village of Springfield stands at the present time in the deed records of Sarpy county in the names of each of 21 signers of the petition (including the eight persons whose qualifications are in dispute). He answered that he had; that this examination was made on Monday of that week, and that no filings had since been made affecting the title; that he took up each name separately and made the examination. Original deeds of real estate in the village to four of the eight persons were produced at the hearing. It was also stipulated that another was an heir at law of a deceased freeholder who died intestate seized of real estate in the village of Springfield, and that he is a resident of the village. Three others each testified that he owned real estate in Springfield, and that he was a resident of the village. It was also stipulated that the remaining signer was a resident of the village. There was no evidence on the other side. It was contended that, because one of the signers became a resident on the day he signed the petition, he was not qualified so to do. The essential qualification is *bona fide* residence, and it is unnecessary that the signer has not acquired such a residence as would permit him to be a legal voter. The evidence shows this man had long been a resident of the county and was a resident in good faith of the village.

It is true that as to one signer, who is stipulated to be a resident, the evidence as to his ownership of real estate is not of much weight, but we think that, in the absence of anything to the contrary, there was sufficient to make a *prima facie* case as to him. *In re MacRae*, 75 Neb. 757.

Considering the whole case, we are satisfied that the district court did not err in affirming the action of the village board. Its judgment is therefore

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

E. M. BERKLEY, APPELLANT, v. ANDREW J. STEWART ET
AL., APPELLEES.

FILED OCTOBER 31, 1913. No. 16,967.

Principal and Agent: AUTHORITY OF AGENT: PAYMENT. "Where one has placed his agent for the investment of money in notes and mortgages in such a situation that persons of ordinary prudence, acquainted with business usages, would be justified in regarding such agent as having full authority with reference to the extension, collection, etc., of such notes and mortgages, payment to such agent will be deemed payment to the principal." *Harrison Nat. Bank v. Austin*, 65 Neb. 632; *Walker v. Hale*, 92 Neb. 829.

APPEAL from the district court for Clay county: **LESLIE G. HURD, JUDGE.** *Affirmed.*

Charles H. Sloan, Frank W. Sloan and J. J. Burke, for appellant.

R. D. Sutherland, D. T. Barrett, M. L. Corey, F. B. Donisthorpe, S. W. Christy and L. E. Cottle, contra.

ROSE, J.

Plaintiff brought this suit to foreclose a mortgage for \$1,800 on a quarter-section of land in Clay county. The mortgage and the note secured were executed by Andrew J. Stewart and Ada Stewart, June 25, 1898, and were payable June 25, 1903. In a cross-bill, F. J. Walker, defendant, pleaded a mortgage on the same land for \$1,200, executed by the same mortgagors, dated June 25, 1898, and payable in five years. After execution of these instruments, mortgagors transferred their interests in the land to William R. Thurber, who, with his wife, executed in favor of J. O. Walker, July 1, 1905, a mortgage for \$3,000, due July 1, 1910. As J. O. Walker's assignee, the Citizens Bank of Geneva, defendant, pleaded the Thurber mortgage in a cross-bill and prayed for a foreclosure thereof. The Stewarts in their answer pleaded that they

paid to J. O. Walker, as agent of mortgagees, their indebtedness in full. The trial court found in favor of the Stewarts and canceled their mortgages. There was also a finding that a balance of \$577.88 on the mortgage held by the Citizens Bank of Geneva was unpaid and a decree of foreclosure to pay the same was entered. Plaintiff and F. J. Walker have appealed.

That the debt and interest secured by the canceled mortgages were paid by mortgagors to J. O. Walker is not disputed. Were mortgagors justified in making payment to him as the agent of mortgagees? This is the controlling question. In borrowing the money the debtors dealt with J. O. Walker, as agent of the creditors. Through him mortgagees received from mortgagors several years' interest and part of the principal. J. O. Walker received also the unpaid balances due, but did not turn the funds over to mortgagees. The evidence relating to his conduct and authority has been carefully examined. Similar transactions in which he was a participant have been scrutinized by this court in other litigation. *Walker v. Hale*, 92 Neb. 829; *Walker v. Rudd*, 92 Neb. 839; *Walker v. Stewart*, 92 Neb. 845; *Walker v. Carlson*, 92 Neb. 850; *Walker v. Hokom*, ante, p. 399. In those cases the following rule was adopted and applied: "Where one has placed his agent for the investment of money in notes and mortgages in such a situation that persons of ordinary prudence, acquainted with business usages, would be justified in regarding such agent as having full authority with reference to the extension, collection, etc., of such notes and mortgages, payment to such agent will be deemed payment to the principal." *Harrison Nat. Bank v. Austin*, 65 Neb. 632.

Under the principle stated, the evidence justified the finding of the trial court that J. O. Walker was the agent of mortgagees, when he received the balances due on the mortgages canceled in the present case. The decree below is therefore

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

Dugger v. Smith.

WILLIAM C. DUGGER ET AL., APPELLEES, v. ELIZA C. SMITH,
APPELLANT.

FILED OCTOBER 31, 1913. No. 17,143.

Appeal: BILL OF EXCEPTIONS: AUTHENTICATION. On appeal, a document appearing in the record as a bill of exceptions, when not authenticated as such by the certificate of the clerk of the district court, will be disregarded.

APPEAL from the district court for Morrill county:
HANSON M. GRIMES, JUDGE. *Affirmed.*

G. J. Hunt, for appellant.

Williams & Williams, F. A. Wright and J. G. Mothersead, contra.

ROSE, J.

For the purpose of burning grass and weeds in an irrigating ditch running through a meadow of defendant, she set out a fire, which spread to the lands of plaintiffs. This is an action to recover resulting damages in the sum of \$393. She denied the negligence imputed to her, but the jury rendered a verdict against her for \$247. From a judgment thereon, she has appealed.

The rulings assailed cannot be reviewed without an examination of the evidence. The bill of exceptions is challenged by motion, because it is not authenticated as such by the certificate of the clerk of the district court. In this respect there was a failure to comply with a mandatory provision of statute. Code, sec. 587b. For this reason, the evidence cannot be considered on appeal. *Union Stock Yards Nat. Bank v. Lamb*, 92 Neb. 608. The judgment must therefore be affirmed. A consideration of the testimony as disclosed by the document purporting to be a bill of exceptions would not, however, result in a reversal.

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

EMERSON-BRANTINGHAM COMPANY, APPELLEE, v. ROBERT
MCNAIR, APPELLANT.

FILED OCTOBER 31, 1913. No. 17,342.

Trial: DIRECTING VERDICT: EVIDENCE. It is not error to direct a verdict for plaintiff, where the evidence is sufficient to support his cause of action, but is insufficient to sustain the only defense pleaded.

APPEAL from the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Albert W. Crites, for appellant.

Allen G. Fisher, *William P. Rooney* and *E. G. McGilton*, *contra*.

ROSE, J.

This is an action to recover from defendant \$342.50 for an engine plow manufactured by plaintiff. Defendant was plaintiff's agent at Crawford, and for some time had been in possession of the implement under a technical contract of agency which made him liable for wholesale prices of articles sold by him. At a time when he was authorized to return to plaintiff the plow as unsold stock, he sold it and shipped it to the purchasers, and so notified plaintiff by a letter in which he requested the manufacturer to ship directly to them some specifically described attachments. The substance of the defense pleaded is that, before the plow was sold, the agency had been terminated and defendant ordered to return to plaintiff the stock in his possession; that the goods on hand, including the plow in controversy, were prepared for shipment to plaintiff; that, before they were in fact shipped, there was an opportunity to sell the plow, and that plaintiff, upon being notified thereof, directed defendant to ship to the purchasers such parts of the plow as were in his possession, the missing parts to be shipped directly from head-

Emerson-Brantingham Co. v. McNair.

quarters; that defendant followed such directions; that thereafter plaintiff took charge of the transaction, sent experts to set up the plow and to make settlement therefor; that plaintiff credited defendant with a return of the plow. The trial court directed a verdict in favor of plaintiff, and defendant has appealed.

Defendant concedes: "The only real question in the case is whether or not there was evidence which should have been given to the jury?" The evidence shows without contradiction that, with the exception of some attachments, the plow was in the hands of defendant as plaintiff's agent; that the price, to the agent, was \$342.50; that by the agent the plow was shipped from Crawford to the purchasers; that he directed plaintiff by letter to ship to them the necessary attachments; that the purchasers received the plow and attachments, but never paid for them or returned them; that plaintiff never received the purchase price; and that the property was never returned or tendered back. The correct interpretation of the contract of agency and of letters binding defendant is that he sold the goods as agent. Evidence establishing a defense without varying or contradicting writings by which defendant is bound has not been pointed out by him. Error in the record does not affirmatively appear.

AFFIRMED.

HAMER, J., dissenting.

I am unable to agree with the majority opinion in this case. The real question would seem to be whether there was evidence which required a submission to the jury. The defendant ran a retail establishment at Crawford, Nebraska. He had been the agent of the plaintiff. He had received from the plaintiff a steam plow. He was to sell the plow as the agent of the plaintiff. Before the plow was sold his agency seems to have terminated. Before the plow was shipped he got an opportunity to sell it, and thereupon he notified the plaintiff concerning such opportunity, and received directions from the plaintiff to

ship the plow, or such parts of it as were in his hands, to the proposed purchasers. He shipped such parts of the plow as he had to Kendrick & Hollinrake. They were the proposed purchasers. The defendant claims that the plaintiff took charge of the transaction; that it sent its own experts to set up the plow and to make settlement for it, and that the defendant never had any control over the matter, but that he shipped the plow as he was directed to by the plaintiff. In the brief of the plaintiff (appellee) a letter is copied on page 2. It is directed to the plaintiff company before its name was changed. It reads: "We have a chance to dispose of a part of the steam plow outfit that we were to return to you. We find in getting this plow ready to load that we are short the following parts, which you will kindly rush to Kendrick & Hollinrake, Marsland, Nebr., via B. & M." Then there is a description following, which purports to contain a list of the parts of the plow which the defendant did not have, and also certain details about other matters. It would seem to be evident that, if what was done was done under the specific direction of the plaintiff, then the defendant is not liable. The defendant, McNair, testified that he was the owner of his business at Crawford, and that he looked after things occasionally. There seems to have been evidence tending to show that the plow was sent to Marsland, or at least such parts of it as were in the hands of the defendant, and that the plaintiff sent the other parts direct to Marsland from headquarters. There was wrangling about the matter and considerable correspondence showing an attempt to settle.

In the mind of the writer the case was one eminently proper for the determination of a jury. The question is not what we would do as judges if the case had been submitted to us. The jury should have been allowed to exercise its peculiar functions. It had that right over and above the court, and it was no part of the duty of the court to take away from the jury its prerogative. The defendant was entitled to have the jury express their

opinion. If the court had overruled the plaintiff's motion for a directed verdict and the case had been submitted and the jury had found for the defendant, there would have been evidence enough to sustain the verdict. That is one of the ways by which the correctness of the ruling of the trial court may be tested when a motion for a directed verdict on behalf of the plaintiff is sustained. The courts cannot be too careful in protecting the rights of litigants. One of their rights in a law case is a submission of the facts to a jury under proper instructions of the court.

STATE, EX REL. CITY OF OMAHA, APPELLEE, V. UNION
PACIFIC RAILROAD COMPANY ET AL., APPELLANTS.

FILED OCTOBER 31, 1913. No. 17,621.

1. **Statutes: VALIDITY: RAILROADS: CONSTRUCTION OF VIADUCTS.** The statute authorizing the city of Omaha to require railway companies to construct above their tracks at street crossings such viaducts "as may be deemed and declared by the mayor and council necessary for the safety and protection of the public" is a valid exercise of police power.
2. **Municipal Corporations: POLICE POWER: RAILROADS: VIADUCTS.** Within constitutional and statutory limits, the mayor and council of the city of Omaha are the sole judges as to when and how the police power of the municipality shall be exercised in requiring railway companies to construct viaducts over their tracks where they cross public streets at grade.
3. —: **ORDINANCES: VALIDITY: RAILROADS: VIADUCTS.** In considering the validity of an ordinance directing railway companies to construct a viaduct over tracks which cross a public street at grade, it will be presumed that the mayor and council acted with full knowledge of existing conditions relating to municipal legislation on that subject.
4. —: **POLICE POWER: RAILROADS: VIADUCTS: CLOSING STREETS.** The city of Omaha, in the exercise of its police power, may require railway companies to construct a viaduct over their tracks, without making provision for closing the street where the tracks cross it at grade.

APPEAL from the district court for Douglas county:
CHARLES LESLIE, JUDGE. *Affirmed.*

*William Baird & Sons, B. H. Dunham, Herman Aye
and Edgar M. Morsman, Jr., for appellants.*

*Benjamin S. Baker, John A. Rine, W. C. Lambert and
L. J. Te Poel, contra.*

ROSE, J.

Relator applied for a peremptory writ of mandamus compelling defendants to construct at their own expense on Nicholas street, in Omaha, a viaduct running east and west over their intersecting railway tracks. Defendants resist the application on the ground that the city attempted to require the construction of the viaduct without making provision for closing the street where their tracks cross it at grade. The writ was allowed, and defendants have appealed.

Was the writ properly allowed? Conforming to statutory procedure, the city, by adoption of plans, by resolution, and by ordinance, directed the railway companies to construct a viaduct on Nicholas street over their tracks, but made no provision for closing the street where the tracks cross it at grade. The plans for the viaduct require a roadway 24 feet wide and a sidewalk space 8 feet wide, the whole to occupy about half the street along the north side. A witness for defendants testified: "The plans of this proposed viaduct, so far as I know, are as well arranged as might be possible." That the structure planned would be sufficient to accommodate the traffic of Nicholas street is not questioned. Defendants admit that the grade crossing is dangerous and that a proper viaduct is essential to public safety. Did the city exceed or abuse its authority? Power to require railway companies to construct above their tracks at street crossings such viaducts "as may be deemed and declared by the mayor and council necessary for the safety and protection of the public" is

in direct terms conferred by the legislature upon the city of Omaha. Comp. St. 1911, ch. 12a, sec. 128. Such an enactment is a valid exercise of police power. *Chicago, B. & Q. R. Co. v. State*, 47 Neb. 549; *Phoenix Mutual Life Ins. Co. v. City of Lincoln*, 91 Neb. 150; *Chicago, B. & Q. R. Co. v. Nebraska*, 170 U. S. 57; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556; *Northern P. R. Co. v. Duluth*, 208 U. S. 583; *State v. St. Paul, M. & M. R. Co.*, 98 Minn. 380.

To justify their refusal to comply with the demands of the city, defendants argue that its action is void, because it attempted to burden them with the expenses of a viaduct which will not promote the public safety. In support of this defense they offered proof tending to show that they are willing to comply with proper plans for a viaduct; that the one planned by the city would be a detriment to them in the operation of their trains across Nicholas street, and that, to avoid inclines at the approaches and exposure to wind, rain, heat, and cold, the public would continue to use the unclosed street where it crosses the tracks at grade. What is a proper viaduct? It is not the province of the railway companies to determine that question as a police regulation. The municipal action which resulted in the demand for a highway over defendants' tracks, where they cross Nicholas street, was the exercise of police power—an attribute of sovereignty committed by the legislature to the city, but not to defendants. Within constitutional limits, the mayor and council are the sole judges as to when and how such police power shall be exercised. *State v. Withnell*, 91 Neb. 101. In considering the question presented, defendants' conception of a proper viaduct, therefore, is immaterial, except in so far as it may indicate in some way that the city abused or exceeded its authority. There is no greater merit in the assertion of defendants that the viaduct planned by the city would be detrimental to them in the operation of their trains across Nicholas street. The statutory justification for the exercise of the police power is "the safety and pro-

tection of the public." This was the primary object, rather than the convenience of the corporations which created a place of danger by crossing a public street at grade.

Would the public generally continue to use the grade crossing? Would obstructions supporting the viaduct and failure to use it make traffic on Nicholas street more dangerous than before? In attempting to answer these questions in the affirmative, defendants offered to prove that at Argenta, Kansas, where they say there is a viaduct similar to that planned by Omaha, 90 per cent. of the travel by foot and wagon crosses the railway track at grade. Proof of this nature was rejected by the trial court, but its admission and consideration would not result in a holding that the city of Omaha abused or exceeded its power. It is conceded that the viaduct planned would be sufficient to accommodate the traffic of Nicholas street. Provision has therefore been made for the safety of the public. If 90 per cent. of the people would voluntarily abandon a safe and convenient viaduct for a place of danger on railroad tracks among moving trains and engines, as defendants assert, the city would nevertheless have control of the grade crossing and of the public travel there. It would still have power to close the street and to protect the public. Its authority in that respect can neither be abandoned nor bartered away. It should not be presumed in advance that official obligations to protect the public will be neglected. Notwithstanding the offered proof, it will be presumed that the city, in passing ordinances, acted with full knowledge of the conditions relating to the subject of municipal legislation. *State v. Withnell*, 91 Neb. 101. While defendants were operating their railways at grade, industries sprung up on adjacent land. The owners thereof may have vested rights. Private individuals own real estate abutting on Nicholas street near the tracks of defendants. The closing of the street may interfere with private rights and damage private property. In passing ordinances, it was proper for the mayor and council to consider existing conditions and to relieve the city and

the defendants from unreasonable or unnecessary burdens. The consideration of such burdens may account for the present failure to close the grade crossing. The right of the city to require defendants to construct the viaduct does not depend upon the closing of that part of the street in controversy. *People v. Union P. R. Co.*, 20 Colo. 186. In *Missouri P. R. Co. v. City of Omaha*, 197 Fed. 516, a case involving a similar ordinance of the city of Omaha, Judge Hook, speaking for the United States circuit court of appeals (Eighth circuit) said: "It is also urged that the ordinance is void because the grade crossing of the railroad tracks under the viaduct was left open for travel, thereby negating that necessity for an overhead structure upon which the power of the city depended. This is but another way of asserting that the requirement of a viaduct must be accompanied by a complete vacation or abandonment of the surface crossing—that the city is without power to require a railroad company to build a viaduct for less than all the street traffic. The contention is untenable. The necessity for the safety and protection of the public is the statutory warrant for the ordinance, but its extent is for the judgment of the municipality. Conditions might exist in which a mere foot-bridge for pedestrians would be regarded as sufficient. It is probable that in the present case the grade crossing was left for the convenience of those owning property and doing business under the viaduct and to lessen the injury to abutting property which would follow its vacation. But whether so or not, we cannot say as matter of law that an abuse of the power conferred by the statute has been shown."

The conclusion is that the writ was properly allowed.

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

DODGE COUNTY BANK, APPELLEE, v. COURTNEY & COMPANY, APPELLANT.

FILED OCTOBER 31, 1913. No. 17,244.

Appeal: AFFIRMANCE: DIRECTING VERDICT. Where the record contains sufficient evidence to sustain a directed verdict, and such verdict is the only one which, under the pleadings and evidence, could be permitted to stand, the judgment rendered thereon will be affirmed.

APPEAL from the district court for Douglas county:
WILLIAM A. REDICK, JUDGE. *Affirmed.*

Frank H. Woodland and Carl E. Herring, for appellant.

D. L. Johnson, H. C. Brome and S. O. Cotner, contra.

FAWCETT, J.

From a judgment of the district court for Douglas county upon a verdict directed for plaintiff, in an action on a promissory note, defendant appeals.

The note in suit was dated February 12, 1909, payable six months after date to the order of Courtney & Company, for \$5,000, with interest at 6½ per cent., signed, "Tolf Hanson, Chas. R. Courtney," and the collection of same guaranteed by the written indorsement of the payee, Courtney & Company. The answer alleges, substantially: First. That the money which it is claimed constituted the consideration for the note in suit was loaned to A. E. Tunberg prior to the execution of the note in suit; that plaintiff loaned the money to Tunberg, and that that loan was the consideration for Tunberg's note, and is the identical money for which the plaintiff seeks to recover, all of which was well known to plaintiff; that the bank then had existing loans to Tunberg in amount of 20 per cent. of its capital stock and surplus, and, for the purpose of avoiding the banking laws, the note in suit was executed and deposited with plaintiff bank with full knowledge of all the

facts and for the purpose set out, and at the special instance and request of the bank; that Tunberg is solvent and the principal debtor for the consideration of the note in suit. Second. Want of consideration. Third. That the note is void, for the reason that it was knowingly and wilfully accepted by the bank in violation of section 3732, Annotated Statutes of Nebraska, and that the bank devised the scheme or artifice to avoid "said banking laws." Fourth. Payment in full. The reply denies all allegations in the answer not specifically admitted, and then pleads at considerable length facts and circumstances which will be substantially covered in the discussion of the case.

Defendant's brief contains no formal assignments of error, and argues but two points: That the record presents a "question of fact for submission to the jury;" and, the "law applicable." The former of these two propositions is all that need be considered, as the "law applicable" to a question of that kind is too well settled to require citation or consideration of authorities. If the case presents sufficient evidence to have sustained a verdict in favor of the defendant, if one had been returned, or is not sufficient to sustain the judgment directed for plaintiff, then in either case the judgment must be reversed. Otherwise, it must be affirmed.

The rule is well settled in this state that a trial court is not required to submit a case to the jury, unless the evidence supporting it is of such a character that it would warrant the jury in basing a verdict upon it. *Chicago, R. I. & P. R. Co. v. Sporer*, 69 Neb. 8; *Iowa Hog & Cattle Powder Co. v. Ford*, 87 Neb. 708. This rule applies as well to a defense tendered by answer as to a cause of action tendered in a petition. The execution and delivery of the note being admitted, is there sufficient evidence in the record to have sustained a verdict for defendant, had the case been submitted to the jury and such a verdict returned? In *First Nat. Bank v. Smith*, 57 Neb. 454, we held: "Where the conclusion reached by the jury was the only one permissible under the evidence, the judgment

rendered on the verdict will be affirmed." This is now the settled rule in this court, and we think it is equally applicable to a case where the record shows that a directed verdict is the only one, under the pleadings and evidence, which could have been permitted to stand. Applying that rule to the case at bar, an affirmance must follow.

A careful examination of the abstract and supplemental abstract, we think, shows, without room for reasonable disagreement, or inference to the contrary, the following facts: Plaintiff is a banking corporation located at Hooper, Nebraska. One A. E. Tunberg was a business man at Hooper and a patron of plaintiff bank. Tolf Hanson was engaged in the restaurant business in Omaha. Charles R. Courtney was a member of Courtney & Company, and the manager of its grocery business in Omaha. Hanson was a stockholder in the company, and, as stated by Mr. Courtney, was considered as Courtney & Company's best customer. Tunberg and Hanson were cousins. They were both born at the same place in Sweden, and were acquainted before they came to the United States. In 1908 Hanson had become seriously involved financially, so much so that his credit with the Omaha banks had been exhausted. Courtney was his best friend. Tunberg was his cousin. Both were men of financial standing and credit, and to them he appealed for assistance in his extremity. In response to a request from Hanson, Tunberg made a trip to Omaha. Hanson's necessities were discussed. Upon being interrogated by Mr. Tunberg as to the sum required, Hanson stated that he needed \$10,000. Mr. Tunberg was unable to supply the money. After considering the matter in an effort to devise some plan by which the money might be obtained, Tunberg signed a note, dated October 1, 1908, for \$10,000, payable one year after date, to the order of Hanson, with interest at 6 per cent., and Hanson gave him in exchange therefor his note for a like amount. Hanson then tried, unsuccessfully, to discount the note he had received from Tunberg at the First National Bank in Omaha. Having failed there,

Tunberg tried to secure money for Hanson from his own bank (plaintiff) at Hooper. He had already borrowed from the plaintiff all, or substantially all, that plaintiff, under the law, could lend to one person. Tunberg disclosed to plaintiff the use to which he intended to put the money, or rather the person for whom he was desiring to secure the loan. The president of the bank being absent from home, the cashier agreed to make a loan of \$5,000 to Hanson upon a note to be signed by Hanson and Courtney. Thereupon Tunberg gave the bank his own note for \$5,000, and obtained a draft payable to the order of Tolf Hanson for that sum, under an agreement that he would obtain the note of Hanson and Courtney and substitute the same for the note he was then giving. In accordance with that arrangement, Tunberg mailed, or personally took, the draft to Hanson, and, under date of February 12, 1909, a note for the amount of the draft was signed by Hanson and Courtney, payable six months after date to the order of Tunberg. This note Tunberg delivered to the plaintiff bank, and received from the bank the note which he had given at the time he obtained the draft. The note remained in the bank for something like two months, and until the return home of the president. When the president saw the note, payable to Tunberg and indorsed by him to the bank, he objected to it upon the ground that Tunberg, as an indorser of the note, incurred a liability to the bank, which, added to his personal obligations to the bank, would be in excess of the amount the bank could legally lend to any one person. Thereupon, the president prepared the note in suit and handed it to Tunberg, telling him to have it signed by Hanson and Courtney and indorsed by Courtney & Company, and substitute it for the note to which the president was objecting. This matter was explained by Tunberg to Hanson and Courtney, whereupon they each executed the note in suit, and Mr. Courtney executed the indorsement upon the back thereof. The note was then taken by Tunberg to the bank and substituted for the other note signed by Hanson and Courtney, in which

Tunberg appeared as the payee, and the latter note was delivered to Tunberg, who mailed it to Hanson.

In the light of these facts, defendant's contention is not sound that Tunberg was acting as the agent of the bank in obtaining the note from Hanson and Courtney, indorsed by Courtney & Company, in order to enable the bank to make an excess loan to Tunberg. On the contrary, there is no room for doubt that Tunberg was acting as the agent of Hanson, with the full knowledge and concurrence of Courtney, in an endeavor to obtain money for Hanson to help him in his hour of need. The bank knew that this money was being obtained for Hanson. It was unwilling to make any further loan to Tunberg, or to even accept him as an indorser, not because it did not believe he was solvent, but because it had already made him loans, personally, substantially up to its limit. The bank knew that it was making the loan to Hanson, and it wanted Hanson's note, with what it considered a good signer with him. It did not desire, and evidently did not think it needed, the indorsement of Mr. Tunberg. The transaction on the part of the plaintiff seems to have been a perfectly straightforward business transaction.

But, it is said by defendant that the note, so far as Courtney was concerned, was without consideration, for the reason that Hanson had already obtained the money, and that when the bank parted with the \$5,000 to Tunberg, and took his note, it was a closed transaction, and therefore the note, so far as Courtney is concerned, is without consideration. This theory is not borne out by the testimony of even Mr. Courtney himself. As shown in the supplemental abstract, he testified that he signed the note payable to the order of Tunberg, on the day it bears date, in Hanson's office; that Hanson told him that Tunberg had the \$5,000; that he said: "Alex got the money, but we have got to sign a note. You will do it, won't you?" He admits that at that time he saw the draft, or the paper purporting to be the draft. He testified that that was the time when Tunberg said he owed

the bank \$4,000, and that the bank wanted a couple of friends to sign the note; that it would be an excess loan, and that that was "all the bank wanted us to sign the note for. He did not use the language 'excess loan,' but that is what he meant." He testified that he had had no talk with Tunberg about raising money for Hanson before February 12, the date the first note was signed, but had had lots of talks of that kind with Hanson. He then testified that four weeks later he signed the note in suit. He says that at that time he was told by Tunberg that the president of the bank, on returning from Texas, was not satisfied with the note that had been previously signed, "because it defeated the object of the note, and that he, Mr. Lyman, had made out a note and sent it down for us to execute." It is clear, therefore, by Mr. Courtney's own testimony, that the note in suit was signed with the knowledge that it was going to take the place of the note which he had signed with Hanson to Tunberg as payee, on February 12, 1909, upon which latter note he knew that at the time it was signed Hanson was receiving a draft for \$5,000 from the bank. It is made clear, therefore, by all of the testimony in the case that the making and deposit by Tunberg of his individual note and obtaining the draft thereon was under an agreement that he would substitute the note of Hanson and Courtney therefor; that the note by Hanson and Courtney to Tunberg and the subsequent note by them to Courtney & Company and indorsed by Courtney & Company and delivered to plaintiff bank, and the surrender by plaintiff bank of the original Tunberg note to Mr. Tunberg, were all parts of one single transaction, that the money passed from the plaintiff bank to Hanson as a result of that transaction, and that the purpose of the transaction was to bring about that result.

In the light of these facts, no verdict could have been permitted to stand other than the one which the trial court directed.

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

CHARLES BOWERS, APPELLANT, v. JAMES RAITT ET AL.,
APPELLEES.

FILED OCTOBER 31, 1913. No. 17,956.

Contracts: RESCISSION: EXCHANGE OF PROPERTY. Where a party of full age and competent to contract has full opportunity to acquaint himself as to all of the particulars of a proposed exchange of properties, and personally inspects the property, which he is about to receive in such exchange, before the exchange is made, he cannot go ahead and consummate such exchange, and then, upon ascertaining later that he has made an unwise trade, invoke the aid of a court of equity to undo what he has himself carelessly or negligently done.

APPEAL from the district court for Dodge county:
GEORGE H. THOMAS, JUDGE. *Affirmed.*

George L. Loomis and Courtright & Sidner, for appellant.

F. Dolezal and C. E. Abbott, contra.

FAWCETT, J.

This suit was instituted in the district court for Dodge county, to cancel a contract for the exchange of a note of \$11,500 and certain real estate of plaintiff in Holt county for a flour mill property situated at Prague, in Saunders county. From a finding and judgment for defendants, plaintiff appeals.

The assignments of error are: (1) The court erred in finding for the defendants. (2) The finding and decree are not supported by the evidence. (3) The court erred in overruling plaintiff's motion for a new trial. (4) The court erred in refusing plaintiff permission to file a supplemental motion for a new trial on the ground of newly discovered evidence and misconduct of the prevailing party. Three points are argued in plaintiff's brief: (a) "Representations as to value," meaning the value of the mill property; (b) "representations as to profits," mean-

ing the profits which had been realized by the former owners of the mill; and (c) "supplemental motion for a new trial."

We will consider the last point first. The decree was entered November 19, 1910. Immediately thereafter, and on the same day, a motion for a new trial was filed. On the next day a supersedeas bond was filed. Nearly 11 months later, on October 11, 1912, plaintiff asked and was given leave to file a supplemental motion for a new trial, supported by affidavit. This motion was based upon two grounds: First, newly discovered evidence; and, second, misconduct of the principal defendants R. G. Lyon and James Raitt. The substance of the affidavit filed in support of the motion is that the defendants Lyon and Raitt and their attorneys attempted to influence the testimony of the witnesses Kastle, Wolf, and Kaspar, in that, knowing that they were material witnesses upon the part of plaintiff, they entered into a contract with the witness Kastle, by which contract defendants entered into a secret agreement with the witnesses whereby the defendants sold to Kastle the note for \$11,500, which was the principal consideration of the contract between plaintiff and defendants, and agreed to take from Kastle the Texas land which defendants had traded to him in a prior deal for his interest in the mill property. On November 9, 1912, the court overruled both the original and supplemental motions. The evidence is not clear that the deal, whatever it was, between the defendants and Kastle, was of the character and for the purpose claimed; but, whether so or not, if the defendants had the thought in mind that by making such a deal with Kastle it would influence the testimony of the three witnesses named, their testimony, when called by plaintiff, must have dispelled that thought. They proved to be fair and candid witnesses, and we are unable to discover from an examination of their testimony that any one of them in any particular deviated from the truth. It is clear, therefore, that plaintiff was not prejudiced by the acts complained of.

As to the other two points, viz., "representations as to value," and "representations as to profits," we think, as the trial court evidently did, that the evidence preponderates in favor of the defendants. It would serve no good purpose to set out the testimony in full in this opinion. To sum up in a few words, plaintiff and defendants Lyon and Raitt, the agent of defendant Lyon, were all three traders of more or less experience. Plaintiff is a man over 50 years of age. Before making the trade, plaintiff and Raitt visited and inspected the mill, and on the same evening entered into the contract of exchange, from which plaintiff now asks to be released. If defendant got the better of the trade, we do not think it was by reason of any misrepresentations by, or on account of any undue influence of Raitt over plaintiff. Plaintiff had every opportunity to fully advise himself both as to the value of the mill and the amount of profits that had been earned by the former owners. If he saw fit to refrain from investigating those questions and to make the deal without doing so, it was his own fault. Where a party of full age and competent to contract has full opportunity to acquaint himself as to all of the particulars of a proposed trade, he cannot go ahead and consummate a deal, and then, upon ascertaining later that he has made an unwise trade, expect a court of equity to undo what he has himself carelessly or negligently done.

We think the judgment of the district court is right, and it is

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

WILBUR F. BRYANT, APPELLANT, v. JARED T. RUNYAN,
APPELLEE.

FILED OCTOBER 31, 1913. No. 17,125.

1. **Attorney and Client: ACTION FOR SERVICES: EVIDENCE: COMPETENCY.** In an action by an attorney at law to recover for services rendered in the defense of defendant's son, who was tried upon a charge of felony, there being evidence tending to prove that defendant employed and undertook to pay plaintiff for his services, evidence that plaintiff knew when he entered upon the employment that defendant's "financial condition was good" and that the son "was financially insolvent" is competent.
2. ———: ———: ———. If in such case plaintiff testifies that before he undertook the employment the defendant told him, "There will be no fancy attorney fee paid," and "I will have the attorney fee to pay, Charlie (the son) has nothing," and the defendant testifies, admitting a part of the language so attributed to him, the defendant's testimony that "I did not at that time promise to pay him" will be regarded as defendant's construction of the words used by him, and not as a denial that he used them.
3. ———: ———: ———. If the defendant made statements to the plaintiff which under the circumstances might reasonably be construed to amount to his employment of the plaintiff, the defendant's further statements in the same connection that "I didn't want him in the case personally, myself; I didn't want him. I said Charlie (the son) wanted him all right"—should not be construed as a denial that the defendant employed plaintiff to defend defendant's son because the son wanted him to do so.
4. ———: ———: ———. Evidence tending to show that plaintiff agreed to accept the same fee that his associate counsel had accepted is not considered, since there is no evidence tending to show that plaintiff has been paid the same amount as was paid his associate, and such agreement, if proved, would not therefore justify the general verdict for defendant.

APPEAL from the district court for Cedar county:
GUY T. GRAVES, JUDGE. *Reversed.*

George W. Ayres, for appellant.

B. Ready and Mockett & Peterson, contra.

SEDGWICK, J.

The plaintiff brought this action to recover a balance alleged to be due him for services as attorney at law in the defense of the defendant's son, who was prosecuted upon a charge of assault with intent to murder. The jury in the district court for Cedar county found a verdict for the defendant, upon which judgment was entered, and the plaintiff has appealed.

The plaintiff testified in his own behalf, showing somewhat in detail the services rendered by him in the criminal prosecution against the defendant's son, and testified that the services rendered by him were of greater value than the amount sued for. This testimony is not denied. The plaintiff also testified that shortly before the trial of the criminal case he had an interview with the defendant, in which the plaintiff wanted to continue the criminal case over the term, and the defendant objected to its being continued. The defendant wanted an immediate trial, but the son, who was being prosecuted, was indifferent about it, and in that conversation the defendant said to the plaintiff: "There will be no fancy attorney fee paid," and "I will have the attorney fee to pay, Charlie (the son) has nothing." The defendant was also a witness in the case, and in his testimony referred to the same conversation, admitted that he told the plaintiff that there was not going to be any fancy attorney fee paid to any one, and testified: "I did not at that time promise to pay him." He did not deny that he stated to the plaintiff, as the plaintiff testified, "I will have the attorney fee to pay, Charlie has nothing," but seems to have construed this as not being a direct promise to pay him.

The defendant also testified that he told the plaintiff that "I didn't want him in the case personally, myself; I didn't want him. I said Charlie wanted him all right." He now asks to have this language construed as meaning that he himself was not to pay the plaintiff, but Charlie was to pay him. In the light of the other evidence, it

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would seem rather to be properly construed that he was willing to pay the plaintiff for the services simply because Charlie wanted him, and not because he, this defendant himself, thought it was advisable to employ him.

The plaintiff, while upon the witness stand, offered to prove that he knew at the time he undertook the employment that the son was financially insolvent, and was also acquainted with the financial standing of the defendant in the case and knew that his financial condition was good. This evidence was objected to, and was excluded by the court. The evidence should have been admitted, and, in connection with other evidence in the case, as the case then stood, would have required a verdict for the plaintiff. There was no substantial defense to the plaintiff's claim.

There was some evidence tending to show that the plaintiff agreed to accept the same fee that his associate counsel had accepted, and his associate counsel accepted a less amount than the amount sued for. This issue is not very fully presented, and its importance is not considered here, because the evidence does not tend to show that the plaintiff has already received the same compensation as received by his associate counsel.

While the action was pending in this court, the defendant died, and the action was revived against his widow, Sarah Runyan.

The judgment of the district court is therefore reversed and the cause remanded.

REVERSED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

HENRY J. DAVIS, APPELLEE, v. HENRY E. CLARK,
APPELLANT.

FILED OCTOBER 31, 1913. No. 17,144.

Appeal: CONFLICTING EVIDENCE. When the trial court, without objection, submits the case to the jury upon one question of fact involved in the issues, and the evidence upon the question so submitted is substantially conflicting, a general verdict of the jury will not be set aside upon appeal to this court, unless the finding upon the issue so submitted is clearly wrong.

APPEAL from the district court for Morrill county:
HANSON M. GRIMES, JUDGE. *Affirmed.*

G. J. Hunt, for appellant.

Williams & Williams, contra.

SEDGWICK, J.

This action was begun in the county court, and afterwards appealed to the district court for Morrill county. The plaintiff alleged that he sold one of his cows to a butcher for \$26, and afterwards the defendant claimed to be the owner of the cow, and by reason of the threats of the defendant the plaintiff did pay to the defendant the sum of \$50, under duress, and asked for a judgment for the \$50 and interest. The defendant alleged that the cow in question was his, and denied the allegation that plaintiff paid the money under duress. The jury rendered a verdict in favor of the plaintiff for \$50 and interest, and judgment was rendered thereon, from which the defendant has appealed.

There was a large amount of evidence introduced on both sides, and apparently without objection, as to the ownership of the cow. This evidence appears not to be conclusive either way. The witnesses for the plaintiff are quite positive, and identify the cow as his. The witnesses for the defendant are equally positive, and identify

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the cow as the property of the defendant. The parties both kept other stock, and it appears that it was not unusual for the animals to stray from one herd to another, so that the parties relied principally upon the brand for identification of the animal. After this animal had been slaughtered, many witnesses examined the hide, and about an equal number on each side testified positively to the brand. The question was whether the brand which they found was an "H" or a "4." It appears that the county judge and another officer had carefully examined the hide upon the trial in the county court, and they testified that it was impossible to tell whether the brand was an "H" or a "4." These witnesses were disinterested and their evidence upon this point was undoubtedly reliable. It appears, then, that as to the ownership of the animal the evidence is in doubt and the question is apparently incapable of solution. Such questions have more than once resulted in almost interminable litigation, with loss to both parties.

The court instructed the jury that "the question as to who was the owner of the animal in question, the plaintiff or the defendant, is not an issue in this case." It appears that the parties so considered it, and no objection was taken to this instruction, and no modification or explanation asked for, although the evidence is mainly directed to the question of ownership. They have not required the jury to consider the ownership of the property as bearing upon the good faith or want of good faith of the respective parties. They have tried and submitted the case upon the sole question as to whether the plaintiff paid the \$50 to the defendant to avoid arrest. The court and the parties no doubt considered that it would be impossible to determine satisfactorily the ownership of the property, and that equity under such circumstances is with the party in possession, and, in order to have a speedy end to such unprofitable litigation, made the result depend upon the simple question, whether the plaintiff paid defendant the \$50 as a voluntary payment on his

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part or to avoid arrest and litigation. Upon this question the evidence is very conflicting. Mr. Hunt and other apparently fair and competent witnesses testified to facts indicating that the plaintiff was convinced that he had made a mistake in selling the defendant's cow, and on that consideration paid the \$50, rather than because he was afraid of arrest. On the other hand, many witnesses testified to facts indicating that the plaintiff paid the money solely for the purpose of avoiding an unjust prosecution.

We cannot determine this controverted question of fact as an original question, but, the evidence being substantially conflicting, we are controlled by the verdict of the jury, and, as the result of this litigation was made to depend upon this question of fact, the judgment of the district court is

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

EUGENE VAN HOVE, APPELLANT, v. MARIA LEONIA VAN HOVE ET AL., APPELLEES.

FILED OCTOBER 31, 1913. No. 17,254.

1. **Parent and Child: ILLEGITIMATE CHILD: HEIRSHIP.** One not the father of an illegitimate child does not make such child his heir by marrying the child's mother and signing the marriage record in which it is recited that the "husband and wife agreed taking as their lawful children and to recognize them as such," naming the said child with other illegitimate children of the woman.
2. ———: ———. The father of an illegitimate child may make such child his heir by marriage with the child's mother and adopting such child into his family; but, when the child is 20 years of age, sending such child money with which to pay passage from a foreign country, and allowing him to live in the family for a short time thereafter, is not adopting him into the

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family, within the meaning of section 4931, Ann. St. 1911. It is not necessary to decide in this case whether said section applies to any other than the father of the illegitimate child.

APPEAL from the district court for Boyd county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Albert & Wagner and D. A. Harrington, for appellant.

M. F. Harrington and Mapes & Hazen, contra.

SEDGWICK, J.

The plaintiff seeks to establish an interest in certain real estate as the heir of August Van Hove, deceased. The district court for Boyd county dismissed his case, and he has appealed.

Plaintiff was the illegitimate son of Maria Leonia Audenaert, a citizen of Belgium, who intermarried with August Van Hove in Belgium in 1887; the plaintiff then being seven years of age. There were then two other illegitimate children of his mother, one of whom died in infancy, and the other was brought to this country by Mr. and Mrs. Van Hove soon after their marriage. They have since resided in this country, and two children have been born to them since.

The contention is that the plaintiff has been made an heir of August Van Hove under section 4931, Ann. St. 1911. The record of the marriage in Belgium recites that "The above named husband and wife agreed taking as their lawful children and to recognize them as such: Eugene Audenaert, born at Sinay, the 9th of March, 1880." The record appears to have been signed by August Van Hove, and it is contended that this satisfied the statute, which provides: "Every illegitimate child shall be considered as an heir of the person who shall, in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child." Ann. St. 1911, sec. 4931. This record is clearly insufficient for that purpose. *Lind v. Burke*, 56 Neb. 785; *Moore v. Flack*, 77 Neb. 52.

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Plaintiff remained in Belgium until he was about 20 years of age, and then came to this country and lived for a short time in the family of August Van Hove, who sent money to pay plaintiff's passage to this country. Plaintiff's passport described him as son of Van Hove. The evidence is that plaintiff was not the natural son of Van Hove, and even if he was, the circumstances are far short of establishing that Van Hove adopted him into his family, within the meaning of said section 4931. Under the laws of Belgium, which are shown in the record, it does not appear easier to establish heirship in such cases than under our statutes.

The judgment of the district court is clearly right, and is

AFFIRMED.

REESE, C. J., LETTON and HAMER, JJ., not sitting.

WILLIAM B. MILLER, APPELLANT, v. CITY OF LINCOLN,
APPELLEE.

FILED OCTOBER 31, 1913. No. 17,377.

1. **Municipal Corporations: ORDINANCES: PASSAGE.** Under the provisions of the statute governing the city of Lincoln, when an ordinance has been read on three different days, and is then substantially amended, it is irregular to immediately pass the amended ordinance without further reading, unless such reading has first been formally dispensed with by a two-thirds vote of all members of the council. But if more than two-thirds of the members elected are present and vote for the amendment and for the passage of the ordinance as amended, the statute is substantially complied with in that respect.
2. ———: **ANNEXING LAND.** The statute governing the city of Lincoln provides that "territory contiguous or adjacent (to the city) which has been by act or acquiescence of the owner subdivided into tracts of not over 20 acres" may by ordinance be included in the city. Under the conditions stated in the opinion, it is held that the council had power by ordinance to include plaintiff's land in the city.

3. Taxation: ASSESSMENT: VALIDITY. Plaintiff being the owner of land known as "irregular tract 29," which was crossed by a boulevard of the city, sold and conveyed to the city that part thereof lying on one side of the boulevard. The part sold to the city was thereupon designated as "lot 78" and plaintiff's tract as "lot 77." Taxes were afterwards assessed against both tracts, jointly described in the assessment as "lot 29." The evidence is not definite and exact as to the acreage of either tract, nor as to the relative value thereof. *Held*, That, as it is impossible to ascertain the equitable proportion of the tax chargeable against plaintiff's tract, the assessment is void, and the plaintiff was not required to tender any portion of the tax before bringing his action to cancel the same.

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Reversed with directions.*

George W. Berge and C. J. Campbell, for appellant.

Fred C. Foster, D. H. McClenahan and Charles R. Wilke, contra.

SEDGWICK, J.

The plaintiff brought this action in the district court for Lancaster county to enjoin the collection of real estate taxes levied by the city of Lincoln and to cancel the same. The plaintiff was the owner of a tract of land lying just outside the limits of the city of Lincoln, known as "irregular tract 29," and sold between two and three acres to the city, which was afterwards known as "irregular tract 78." He retained the remainder of 29, about 7 or 8 acres, afterwards known as "irregular tract 77." The boulevard, which is maintained jointly by the city and by Lancaster county, lies between 77 and 78. The district court found the issues in favor of the city, and the plaintiff has appealed.

1. The first contention is that the ordinance of the city incorporating lot 29 within the city is void, and therefore the plaintiff's lot is not within the city and the city is without authority to levy taxes thereon. On January 29, 1906, an ordinance, No. 359, was introduced in the coun-

cil, which was a general ordinance extending the limits of the city and including lot 29. Afterwards an amended ordinance was introduced, defining the limits of the city and substituted for No. 359. It also included lot 29, and was read on three different days, and was then amended, but no change was made directly affecting lot 29. It was then passed as amended without any further reading, and plaintiff contends that it was not "fully and distinctly read on three different days," as the statute and general ordinances of the city require, and was therefore void. The record shows that all councilmen were present except one, and that all present voted for the amendment of the ordinance, and also for its final passage as amended. Both the statute and the ordinance provided that the rule requiring reading of the ordinance on three different days shall be enforced, "unless the council shall dispense with this rule by a two-thirds vote of the members elected." Comp. St. 1905, ch. 13, art. I, sec. 73. No formal vote was taken dispensing with the rule, but more than two-thirds of all members elected voted for the passage of the ordinance. Cases are cited from the courts of New Jersey, and perhaps other courts, holding that there must be a formal vote dispensing with the rule, but this is altogether too technical for this court to overthrow the will of the council plainly expressed. The precise point has been heretofore expressly determined by this court in *Nelson v. City of South Omaha*, 84 Neb. 434. In that case the court said: "It appears to us that the passage of a formal motion to suspend the rules by two-thirds of the members of the council would have been an idle formality. Two-thirds of the council could have carried such a motion, and then a majority vote could have ordered the second reading by title."

2. The second contention is that the plaintiff's land is not "suitable for city purposes," and could not under the law be included in the corporate limits of the city. There is in the record an exhibit showing a portion of the east part of the city and some adjacent territory. This ex-

hibit is not entirely self-explanatory, and we have not been referred to evidence in the record that fully and satisfactorily explains the relation of the surrounding tracts to the city. It appears, however, that lot 29 was in the form of a square, and that Normal boulevard, above mentioned, runs diagonally through this tract. That part of the tract sold to the city lies on the south and west of the boulevard and is incorporated into the city park, so that the plaintiff's lot 77 adjoins the boulevard. On the same side of the boulevard there are several tracts of land that have been platted into lots and streets, and some of these lots are occupied by residences. There is a sewer and water-main maintained by the city through the park, both crossing the plaintiff's land. The city maintains electric lights within 400 or 500 feet of the land, and some of the platted additions on that side of the street are incorporated in the city. The statute provides (Comp. St. 1905, ch. 13, art. I, sec. 4) that "territory contiguous or adjacent (to the city) which has been by act or acquiescence of the owner subdivided into tracts of not over 20 acres" may by ordinance be included in the city. It seems clear that such tracts of land, situated with reference to the city and its advantages as this tract is, and lying adjacent to one of the principal boulevards of the city, are within the province of this statute.

3. The final contention is that the taxes in question were illegally assessed. It appears from the record that, although the city became the owner of that part of lot 29, afterwards known as lot 78, in 1906, taxes for that year and subsequent years, including the year 1908, were assessed against lot 29, although that description in 1906 had been abandoned.

The defendant invokes the principle that "he who seeks equity must do equity," and contends that the plaintiff should be required to pay that portion of the taxes for the years 1907 and 1908 which are equitably chargeable against his lot. The case of *Challiss v. Hekelnkampfer*, 14 Kan. 474, is cited as authority for this proposition. In

that case "the value of the adjacent lot was three times that of the one in controversy," and the court said: "Clearly, therefore, as taxes are based upon value, the lot in controversy should have paid one-fourth and only one-fourth of the joint tax." If that case should be followed as authority in this state, it does not control in the case at bar. We cannot find in this record a clear basis upon which to compute the portion of tax properly assessable to lot 78 and the portion assessable to lot 77, the lot in controversy. The brief for defendant states the assessed value of lot 29 for the years 1907 and 1908, and the amount of land embraced in each of lots 77 and 78, and concludes that the tax properly chargeable against each lot, respectively, would be in direct proportion to the acreage of each. But no reference is made to any evidence in the record which would establish that lot 78 within the city park is of the same value, acre for acre, as lot 77 on the opposite side of the street. On the other hand, we have observed evidence tending to show that there is such difference in the character and condition of the two lots as to render it probable that lot 78 includes more valuable land than the average of the land in lot 77. The evidence as to the amount of land in each tract, so far as it has been brought to our attention, is not definite and exact. The trial court found that "the evidence is not sufficient to determine the exact amount that should be remitted from said taxes." So far as we are advised, this finding is supported by the record. The trial court, however, concluded that, "it appearing to the court that no tender has been made by the plaintiff and no offer by plaintiff to do equity by paying whatever amount should be justly due, no equitable relief can be allowed plaintiff in the premises as to those taxes for 1907 and 1908." In this conclusion we think the court was in error. If there was no basis upon which to determine what "amount should be justly due," no such tender could logically be made. If the plaintiff's pleading and evidence established that an assessment of taxes had been made upon his prop-

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erty jointly with property of the city, and it was impossible to ascertain how much of that assessment should be charged against his property, it would be idle to offer to pay such a portion of the tax as should be so charged. The trial court included in its findings the statement that "the mutilation of the tax records is disapproved of; the cancelation of a tax should be done without erasure or mutilation of the record, and should affirmatively appear on the record, so that the history of the tax will not become confused or hidden." This criticism is just, and it must be conceded by all that the loss of this revenue to the city is the fault of its officers, and not of this plaintiff. The tax assessed for 1906 was afterwards canceled by the city authorities. The taxes assessed for the years 1907 and 1908 should be canceled also.

The judgment of the district court is reversed and the cause remanded, with instructions to perpetually enjoin collection of the taxes upon the assessment complained of against lot 29 for the years 1907 and 1908, so far as the same affect lot 77.

REVERSED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

SIEMON GOEMANN V. STATE OF NEBRASKA.

FILED OCTOBER 31, 1913. No. 18,136.

1. **Criminal Law: ARRAIGNMENT: WITHDRAWAL OF PLEA: DISCRETION OF COURT.** The complaint in the preliminary examination for gambling, a misdemeanor, charged that the defendant committed the crime with three other persons, naming them. In the district court an information was filed charging that the defendant and two others of the three named in the complaint in the lower court committed the crime with the third party named, and correcting the allegation of the name of one of the parties. The defendant entered a plea of not guilty to the information as filed in the district court and demanded a separate trial. After-

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wards defendant asked leave to withdraw his plea of not guilty for the purpose of objecting to the variance between the information and the original complaint. *Held*, That it was not an abuse of discretion of the trial court to refuse to allow the plea to be withdrawn for such purpose.

2. ———: INSTRUCTIONS: JOINT INFORMATION: SEPARATE TRIAL. When three parties are jointly charged in an information for a misdemeanor in the district court and one of them demands a separate trial, it is not error to instruct the jury that the defendant is so charged, without naming the other parties charged with him.
3. ———: ———: ACCOMPLICE. The failure to caution the jury as to the evidence of an accomplice in a misdemeanor case, in the absence of a special request so to do, is not reversible error.
4. ———: ———: REASONABLE DOUBT. In an instruction as to reasonable doubt in a misdemeanor case, the statement that a reasonable doubt "is an actual substantial doubt arising either from the evidence or want of evidence in the case" is not erroneous.
5. Statutes: AMENDMENT: CONSTITUTIONALITY. Chapter 108, laws 1887, amended section 214 of the criminal code by adding a proviso "for the recovery of money or other property lost in gambling." A similar proviso was held valid in *Perry v. Gross*, 25 Neb. 826. It is not necessary to reconsider the question in this case, since it does not depend upon that proviso.
6. Criminal Law: ASSISTANT PROSECUTOR: APPOINTMENT: DISCRETION OF COURT. It is not an abuse of discretion of the trial court in a misdemeanor case to appoint a former prosecutor, who during his term of office began this prosecution, to assist the present prosecutor in the trial of the case, for the sole reason that such former prosecutor has prosecuted a civil suit against the defendant to recover for services of another attorney rendered in this case.
7. Gaming: SUFFICIENCY OF EVIDENCE. The evidence is examined, and found sufficient to support the verdict.

ERROR to the district court for Wayne county: ANSON A. WELCH, JUDGE. *Affirmed*.

C. H. Hendrickson and H. E. Siman, for plaintiff in error.

Grant G. Martin, Attorney General, and Frank E. Edgerton, contra.

SEDGWICK, J.

The defendant, who is plaintiff in error here, was convicted in the district court for Wayne county of the crime of gambling. He asks for a reversal of the judgment upon several grounds.

1. Complaint was filed in the county court charging that this defendant did on the 23d day of December, 1911, in the county of Wayne, and state of Nebraska, "unlawfully and feloniously play with Earl Moffit and George Ghenther and Sam Miller, at a game called 'draw poker' for money, to wit, \$2, by means of a certain gambling device, viz., a pack of cards." The preliminary examination resulted in holding the defendant for trial in the district court, and in that court an information was duly filed charging defendant in substantially the same words, except that Ed Moffett was named instead of Earl Moffit. A similar information was filed in the district court charging the said Sam Miller with gambling by playing with the defendant and Ed Moffett and George Ghenther, and another information charging George Ghenther with gambling by playing with the defendant, Sam Miller and Ed Moffett. Afterwards the county attorney and Frederick S. Berry, a member of the bar, appeared in open court, together with the three defendants above named, and said Berry assuming to act as attorney for the three defendants, and agreed that the three cases should be consolidated and "information shall be filed against the defendants jointly." The county attorney then filed an information charging Siemon Goemann, Sam Miller and George Ghenther jointly with gambling by playing with Ed Moffett. Except as this information charged the defendants jointly, it was in substantially the same words as each of the former informations in the district court. "And thereupon the said defendants, being in court with their counsel, in open court waive service of copies of said information, time to plead thereto, and consented to immediate arraignment thereon; whereupon said defendants

were duly arraigned by the reading of said information to them, and each entered a plea of 'not guilty' thereto."

About a year later, the case having been several times continued because of the absence of witnesses for the state, and attorney Berry having withdrawn from the case, this defendant appeared by another attorney, and asked to withdraw his plea of not guilty, and tendered a plea in abatement, which alleged that the court was without jurisdiction because "no preliminary examination has been had as by law provided." In support of this proposition, it was alleged that the original complaint in the county court charged the defendant with gambling with Earl Moffit and George Ghenther and Sam Miller, and that in the information filed in this court it was alleged that Ed Moffett, George Ghenther and Sam Miller were the parties played with. There was no allegation, nor is there any evidence that shows that Earl Moffit and Ed Moffett are two different persons. On the other hand, it appears that the same person is intended, and that there had been in the county court a mistake in his name. The trial court refused to allow him to withdraw his plea for the purpose of taking advantage of this technicality. The case had been pending for a long time and was about to be put upon trial. There is no doubt of the right of a defendant in misdemeanor cases to waive such technicality, and it was apparently in his own interest, as well as in the interest of the state, that he should do so. We think that the trial court did not abuse his discretion in refusing to allow the withdrawal of the plea for such a purpose.

2. The court instructed the jury that the information charged that the defendant "did play a game of chance, called 'draw poker,' with said Ed Moffit for money, with a pack of cards, by betting money on the result of said game." This instruction is complained of because the information alleged and the proof tends to show that, not only the defendant played with Ed Moffit, but that also two other parties named in the information joined with

him in so doing. We think the instruction was right; although the three were jointly informed against, they were not necessarily tried together, and the guilt or innocence of one of them would not necessarily depend upon guilt or innocence of the others charged with them.

3. The court also instructed the jury: "And you may give to the testimony of one witness greater weight than you do to that of a greater number of witnesses, if you deem his testimony entitled to greater weight." It is conceded in the brief that "as an abstract proposition of law" this instruction is correct, but it is contended that one of the witnesses against the defendant was an accomplice, and that the court should have so informed the jury and should have told the jury that evidence of an accomplice should be closely scrutinized. We do not find that any instruction of this nature was requested by the defendant, and the evidence in the case is not of such a character as to create a necessity for such an instruction, so as to require a reversal on account of its omission, in the absence of any request for further instruction.

4. The instruction of the court defining a reasonable doubt is complained of. In that instruction the court said that a reasonable doubt "is an actual, substantial doubt arising either from the evidence or want of evidence in the case." The instruction is quite comprehensive, and, when considered as a whole, we do not think the language complained of was misleading.

5. It is contended that section 214 of the criminal code, as amended in 1887, is unconstitutional because it contains more than one subject, and "it is in effect amendatory of other sections and acts which it does not contain."

Sections 214 and 215 of the criminal code were amended by chapter 108, laws 1887. There was added to section 214 a proviso, "to provide for the recovery of money or other property lost in gambling," and the argument seems to be that this proviso is unconstitutional. A similar proviso was held to be valid in *Perry v. Gross*, 25 Neb. 826, and it is not necessary to reconsider the question in this

case, because, even if the proviso should be found to be invalid, it cannot be found that this case depends in any way upon this proviso. This statute, as amended, has been treated as valid legislation when assailed upon other grounds. *Bowen v. Lynn*, 73 Neb. 215.

6. It is also contended that the court erred in overruling the objection to the appointment of A. R. Davis, special prosecutor in this case. The ground of this objection is that Mr. Davis represented the attorney Berry in an action which he brought against this defendant to recover attorney's fees for his services in the preliminary examination in this case. Mr. Davis, however, was county attorney at the time that the prosecution was begun, and conducted the preliminary examination for the state, and afterwards filed an information in the district court. His term of office having expired, the county attorney at the time of the trial requested the court to appoint Mr. Davis to assist in the prosecution, and we cannot find that there was any abuse of discretion on the part of the trial court in so doing.

7. The final contention is that the evidence is not sufficient to support the verdict. There is, however, no ground for this objection. Some of the parties who had been complained against testified that they were not playing poker, and were not playing for money, but were playing pitch. The evidence of Ed Moffett, who was in the game with them, was direct and positive, and was strongly supported by the officers who made the arrest and by other circumstances in the case. The question of the guilt of the defendant was for the jury, and, so far as we have found, was fairly submitted, and their verdict must be conclusive.

The judgment of the district court is

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

JAMES TOWLES, APPELLANT, v. FRANK T. HAMILTON ET AL.,
APPELLEES.*

FILED NOVEMBER 12, 1913. No. 17,359.

1. **Adverse Possession: PAROL RELINQUISHMENT.** Where the title to real property has been perfected by a disseizin so long continued as to take away the right of entry, and bar an action for the land, that title cannot be divested by a parol abandonment or relinquishment (see *School District v. Benson*, 31 Me. 381), unless such abandonment or relinquishment has existed through the statutory period of limitations.
2. ———. "One who has acquired absolute title to land by adverse possession for the statutory period does not impair his title by thereafter paying rent to the owner of the paper title." *Martin v. Martin*, 76 Neb. 335.
3. ———. "A possession of land, open, notorious, adverse and exclusive, indicates a claim of right, and will constitute a disseizin, unless controlled or explained by other testimony." *School District v. Benson*, 31 Me. 381.
4. **Forcible Entry and Detainer: NATURE OF ACTION.** An action for the forcible detention of real property, instituted and carried to a judgment in favor of the plaintiff in such action, who was not the owner of the legal title, and after the title has vested in the defendant therein by limitation, cannot have the effect of extinguishing the title of such defendant. The action is merely possessory, and the question of title cannot be either tried or determined in such case.
5. ———: **PARTIES.** The rule of the code of civil procedure that every action must be prosecuted in the name of the real party in interest applies with as much force in forcible entry and forcible detainer cases as in any other.

APPEAL from the district court for Douglas county:
ABRAHAM L. SUTTON, JUDGE. *Reversed.*

S. I. Gordon, for appellant.

Francis A. Brogan, contra.

* December 24, 1913. Order entered to reverse and remand generally, striking the specific directions; each party to pay his own costs.

REESE, C. J.

This is an action to quiet the title to lot 5, in block 318, in the city of Omaha. Since the appeal was filed in this court the plaintiff has departed this life, and the cause has been duly revived in the name of Walter Towles, his son and only heir. Reference herein to plaintiff will be to the deceased Towles. It is alleged in the petition that plaintiff "has been in the open, notorious, exclusive and adverse possession of all of the said property for about twenty-six (26) years, claiming to own the said property as his own against all persons whomsoever; that he is now in possession of the said property, and has remained continually in possession of the said property from the year A. D. 1884." It is further alleged that defendants claim some interest in the lot in question, but their rights as against those of plaintiff are subject to his, and are denied. Defendants answered by admitting that they claim the property, and alleging that they are the owners thereof. All other averments of the petition are denied. As an affirmative defense defendants plead the entry of a judgment of ouster at the suit of Frank Murphy against the plaintiff, rendered by the district court for Douglas county on the 8th day of November, 1902, the issuance of a writ of possession, and that on the 19th day of said month and year plaintiff was ousted from the possession of the property by the sheriff of Douglas county. Reply, a general denial. A trial was had, which resulted in a finding and decree in favor of defendants and dismissal of plaintiff's petition. Plaintiff appeals.

This being a case in equity, the law requires that the decision thereof must be without reference to the conclusion reached by the district court.

It is beyond dispute that plaintiff took possession of the lot in question in, or prior to, the year 1886, and has retained the possession thereof continuously ever since. If this possession was adverse to the true owner the title became vested in him, unless such title was destroyed by

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what followed in the years 1900 and 1902. If plaintiff and his witnesses are to be believed, and they were in no way impeached, his possession was adverse, he claiming the property as the owner thereof, but without color of title. It is shown that the lot was low, some referring to it as swampy, that he made improvements thereon, by fencing it, causing the whole surface to be filled up, the depth of the filling being from six inches to three or four feet, that he raised hogs and chickens, had a barn thereon, and annually cultivated it as a garden, raising vegetables for family use, etc., his house standing in part at least upon the lot and part upon the adjoining lot owned by him, the two lots being inclosed as one property, and the two used as his home for himself and family.

A number of witnesses testified to his declarations while in possession that he owned the lot, and he testified that his possession during the whole time was as owner. In the year 1900 he was called upon and requested to go to a bank in the city to see Mr. Frank Murphy about the lot, and it is said that both on the way to the bank and in the presence of Mr. Murphy, the attorney for Mr. Murphy and another he declared that he had no claim on the lot; that it was suggested to him that he accept a lease for one year, to which he agreed; that a lease in duplicate was prepared by Murphy's attorney, both being signed by Mr. Murphy and by plaintiff, who signed by making his mark; that one copy was delivered to Mr. Murphy, the other to plaintiff; that the consideration for the lease was one dollar, but plaintiff had no dollar, and the other person present, who was a witness on the trial, offered plaintiff the dollar, which was accepted, the dollar being passed to him, which he in turn handed to Mr. Murphy, when Murphy passed it back to the witness who had "loaned" it to plaintiff. The witness testified that Murphy "got it (the dollar) across the table, and after a while why—he knew I was around there like I am today, not very much money—I think he slipped me the dollar before I went out, and I went off," and thus the dollar was im-

mediately returned to the place from which it came. It is conceded that the lease, if made, was made in the name of Murphy as lessor, and that Murphy had no interest in the lot, and never has had. Unfortunately he died before the case was tried, and his evidence could not be had, but it is said that the then owner of the paper title to the property was his sister, and he had the general management of her property. How this was is not clearly shown. All the testimony as to plaintiff having made any admissions against his interest, and that there was any lease ever made, is denied by him. He testified that no dollar was given him, and he signed no papers. Strict search has been made through the papers and effects of Mr. Murphy since his decease, but no lease of the kind referred to has been found, nor was such a lease ever recorded. So far as is shown by the evidence, such a lease has never been seen subsequent to the time it is alleged to have been made. At the time the lease is alleged to have been given by Mr. Murphy he not only was not the owner of the lot, but there is no proof in the record that he had legal authority to execute such a lease. It may be further observed that at that time plaintiff, by all the evidence upon the subject, had been in the possession of the property for at least 14 years, which was four years more than the statutory period of limitations. If his possession was adverse, the title had before that time become fully vested in him, and his acceptance of the lease or the payment of rent could not divest him of that title. *Martin v. Martin*, 76 Neb. 335, and cases there cited. See *Woodcock v. Unknown Heirs of Crosby*, 92 Neb. 723. It is elementary that where the title has become fully vested by disseizin so long continued as to bar an action, it cannot be divested by parol abandonment or relinquishment or by verbal declarations of the disseizor, nor by any other act short of what would be required in a case where his title was by deed. *School District v. Benson*, 31 Me. 381. We therefore conclude that from any point of view, whether a lease was made or not is not a material matter.

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It must be apparent that the writ of possession offered in evidence, issued in a cause when Mr. Murphy was plaintiff and this plaintiff was defendant, with the return of the sheriff thereon, can have no effect upon the solution of this case. Murphy was not the owner of the land, had no interest in it, and, so far as is shown by this record, was not a proper party plaintiff. The rule of the code that every action must be prosecuted in the name of the real party in interest applies with as much force in forcible entry and detainer cases as in any other, but, even had that suit been prosecuted in the name of the real party in interest, the probative effect of the record offered in evidence could amount to little or nothing in this case, as the question of title could not be litigated nor tried therein, and the result could accomplish nothing more than had he voluntarily, without suit, removed himself, family and effects to other property. In that case if defendants, or any other, had taken possession, plaintiff could have ousted them by law on the ground that the title was in him.

The decree of the district court is reversed and the cause is remanded to that court, with directions to reinstate the case and enter a decree quieting plaintiff's title in the property as prayed for in the petition, taxing all costs to defendants.

REVERSED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

STATE, EX REL. FRANK W. HOLLINGSWORTH, APPELLEE, v.
ALVIN H. ARMSTRONG, MAYOR, ET AL., APPELLANTS.

FILED NOVEMBER 12, 1913. No. 17,432.

Appeal: MOOT QUESTION: DISMISSAL. The supreme court will on its own motion dismiss the respondents' appeal from an order of the district court requiring the respondents to reinstate re-lator's saloon license, where the record shows that the term for

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which the license was issued has long since expired, and that during its existence appellants made no motion to advance the case for determination. *Heesch v. Snyder*, 85 Neb. 778.

APPEAL from the district court for Lancaster county:
WILLARD E. STEWART, JUDGE. *Appeal dismissed.*

Fred C. Foster and *D. H. McClenahan*, for appellants.

T. J. Doyle and *E. J. Murfin*, *contra*.

BARNES, J.

This is an appeal from a judgment of the district court for Lancaster county, rendered July 30, 1911, granting to relator a peremptory writ of mandamus requiring the respondents to assemble and reinstate a license previously granted to him to sell intoxicating liquors in the city of Lincoln, Nebraska.

The license expired in May, 1912, and no one will be benefited or injured by the decision of this case. Why it is being prosecuted we do not understand, because no motion was made to advance the case, and, the license having expired, the case now presents a moot question only for our consideration. We have steadfastly refused to decide such questions, and we do not feel called upon to make an exception in this case. *Heesch v. Snyder*, 85 Neb. 778; *Brown v. Buckley*, 86 Neb. 572.

We therefore decline to pass upon the question presented, and the appeal is

DISMISSED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

CUSHING STATE BANK, APPELLEE, v. ROBERT SALING,
APPELLANT.

FILED NOVEMBER 12, 1913. No. 17,436.

Appeal: CONFLICTING EVIDENCE. Where a case is tried by a jury on conflicting evidence, the supreme court will not set aside the verdict and grant a new trial, unless the verdict is against the clear weight of the evidence, and is manifestly wrong.

APPEAL from the district court for Howard county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

T. T. Bell, and W. A. Prince, for appellant.

F. J. Taylor and W. H. Thompson, contra.

BARNES, J.

The plaintiff brought this action on a promissory note given by the defendant to the plaintiff bank for the sum of \$50. The defendant admitted that he gave the note in suit to plaintiff and that it had not been paid, and by way of a set-off alleged in his answer that plaintiff was indebted to him in the sum of \$250 for one-half of the commission in a real estate transaction where the defendant procured a purchaser for land the plaintiff had for sale, under an agreement that the plaintiff would give the defendant one-half of its commission for procuring a purchaser for the land. The plaintiff admitted that the land was sold to the party the defendant claimed to have procured, and that plaintiff's commission amounted to something like \$500, but denied any agreement to divide the commission with defendant. The verdict was against the defendant on his set-off and in favor of the plaintiff upon the original cause of action. Judgment was rendered on the verdict, and the defendant has appealed.

It is the sole contention of counsel for the defendant that the verdict of the jury was not supported by the evidence, and should have been for the defendant for the dif-

ference between the amount due on plaintiff's note and defendant's set-off, and that the district court erred in overruling the defendant's motion for a new trial. It is conceded in the brief filed by defendant's counsel that the evidence, on the question of the defendant's set-off, was conflicting; but it is argued that, notwithstanding such conflict of evidence, the verdict was clearly wrong. As we read the record, it seems clear that there was a sharp conflict in the evidence relating to the question of any agreement of the plaintiff to divide the commission for the sale of the land in question with the defendant. In fact the defendant's witnesses testified positively that they, the officers of the bank, never had or made any agreement with the defendant in relation to the division of commissions on the sale of any real estate. The defendant's cashier, with whom defendant claimed the agreement was made, denied positively that he ever had any talk or consultation with the defendant in relation to the sale of land or the division of commissions. On the other hand, the testimony of the defendant was, in substance, that there was an agreement with the defendant's cashier by which there was to be a division of commissions, and some evidence was produced tending to some extent to corroborate the defendant's testimony, but on the whole there was such a clear and direct conflict of the testimony as would warrant the jury, if they believed the plaintiff's evidence to be true, in returning a verdict against the defendant on his counter-claim. It follows that, under such circumstances, this court is not warranted in setting aside the verdict of the jury and granting a new trial.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

EDWARD WESTOVER, APPELLEE, V. ABRAHAM L. HOOVER ET AL., APPELLANTS.

FILED NOVEMBER 12, 1913. No. 17,990.

Limitation of Actions: AMENDMENT OF PETITION: NEW CAUSE OF ACTION. When this action was commenced it was brought and was tried on the sole theory of a failure of a master to provide a safe place for his servant to work. Plaintiff recovered, and on appeal to the supreme court it was held that the relation of master and servant did not exist between plaintiff and defendants at the time the plaintiff received his injuries. When the cause was remanded to the district court the plaintiff filed an amended petition eliminating the allegations relating to master and servant, and alleged that plaintiff was working for an independent contractor at the time he was injured, and was on the defendants' premises by their invitation; that he received his injuries by reason of defendants' negligence as inviters upon their premises. *Held*, That the amended petition having been filed more than four years after the plaintiff's injuries occurred, the cause of action stated therein was barred by the statute of limitations.

APPEAL from the district court for Lancaster county:
WILLARD E. STEWART, JUDGE. *Reversed and dismissed.*

E. C. Strode, Jesse L. Root and M. V. Beghtol, for appellants.

E. P. Holmes and G. L. De Lacy, contra.

BARNES, J.

This case is before us on a second appeal. Our former opinion is reported in 88 Neb. 201, where the facts of the case are fully stated, and, except such of them as may be necessary to a determination of this appeal, will not be repeated in this opinion.

The former appeal resulted in a reversal of the judgment of the district court, and when the cause was remanded for further proceedings the plaintiff amended his petition and sought a recovery on the ground that, while he was employed by an independent contractor, he was at

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work upon the defendants' premises by invitation, and was injured by the negligence of the defendants in not furnishing a safe place to work, in not having the premises sufficiently lighted, and by negligently failing to warn the plaintiff of the dangers there existing by reason of the installation and operation of an ice machine in close proximity to the place where the plaintiff was working. Among other defenses the defendants pleaded the statute of limitations. On the second trial the plaintiff had the verdict and judgment, and the defendants have appealed.

It is contended that the court erred in not sustaining the plea of the statute of limitations, and in not directing a verdict for the defendants. When this action was commenced it was one to recover for personal injuries alleged to have been sustained by the plaintiff while in the defendants' service on account of having been set to work by one De Vore, the defendant's foreman, in an unsafe place containing an ice machine in operation, the premises not being properly lighted, the machine being composed in part by a piston and revolving wheel, which was left unguarded, and no warning was given to plaintiff as to the danger, by reason of which his heel was caught and crushed by the revolving wheel and piston. The case was tried upon that theory, and there was no suggestion that the defendants had incurred any other liability than that of a master to his servant. On the former appeal it was held that the relation of master and servant did not exist between the plaintiff and the defendants at the time when the injury was sustained, and for that reason the judgment of the district court was reversed and the cause was remanded for further proceedings. When the mandate was returned to the district court the plaintiff amended his petition by eliminating the allegation that he was defendants' servant at the time he received his injuries, and there was substituted the allegation that plaintiff was working for an independent contractor, and was upon the defendants' premises by their invitation; that he was injured by their negligence, as above stated. The amended

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petition was filed more than four years after the plaintiff sustained his injuries, and, if in effect it stated a new and different ground of recovery, then the bar of the statute was complete, and the trial court should have directed a verdict for the defendants in compliance with their request.

In support of their contention the defendants cite the case of *Johnson v. American Smelting & Refining Co.*, 80 Neb. 250. In the opinion on a rehearing in that case (p. 255) the rule contended for is stated as follows: "A cause of action alleged in an amended petition, although founded upon the same injury as that described in the original, is a different cause of action, if it is dependent entirely upon different reasons for holding the defendant responsible for the wrong alleged."

In an opinion by the present chief justice of the United States in *Union P. R. Co. v. Wyler*, 158 U. S. 285, the effect of a departure from the theory first presented in an action is discussed, and, in disposing of the argument that all the facts necessary to entitle the plaintiff in that case to recover were alleged in the original petition, it was said: "It is argued, however, that, as all the facts necessary to recovery were averred in the original petition, the subsequent amendment set out no new cause of action in alleging the Kansas statute. If the argument were sound, it would only tend to support the proposition that there was no departure or new cause of action from fact to fact, and would not in the least meet the difficulty caused by the departure from law to law."

Martin v. Pittsburg R. Co., 227 Pa. St. 18, was an action brought originally to recover for the death of the plaintiff's husband. The negligence charged was shown to be unfounded, and it was held that plaintiff could not amend by setting up a different theory charging different negligence after limitations have become a bar. Where an action is brought to recover for the death of a person, not an intending passenger, at a street crossing, and the evidence shows no negligence on the part of defendant

railroad company, an amended statement alleging that the person injured was an intending passenger will not be allowed after limitations have become a bar.

Allen v. Tuscarora V. R. Co., 229 Pa. St. 97, was an action brought by a brakeman against a railroad company for injuries received while coupling cars. The original statement was in trespass at common law alleging that the injuries were caused by defendant's negligence in using a coupler more dangerous than the ordinary coupler employed by railroads. An amendment alleging that the defendant was, at the time of the injury, engaged in interstate commerce, with its cars equipped with couplers in violation of the act of congress, March 2, 1893 (27 U. S. St. at Large, ch. 196, p. 531), making it unlawful for a carrier to use cars in interstate traffic not equipped with automatic couplers, and providing that employees injured by a car or train not so equipped shall not be deemed to have assumed the risk occasioned thereby, was held to set up a new cause of action which was barred by the statute of limitations. It was there said: "A departure in pleading may be either in the substance of the action or defense, or in the law on which it is founded."

In *Elrod v. St. Louis & S. F. R. Co.*, 113 Pac. 1046 (84 Kan. 444), the court held: "Where, in an action for injuries to a licensee, there was no allegation that defendant was negligent in failing to light its depot platform, the petition could not be amended so as to charge such failure as a ground of negligence after limitations had run against it."

Chicago & A. R. Co. v. Scanlan, 170 Ill. 106, was an action for injuries caused by the falling of a scaffold. The original declaration averred that the scaffold fell owing to its faulty construction. An amended declaration, filed after the statute of limitations had run, charged negligence in overloading the scaffold. It was held that this stated a new cause of action and the statute was a bar.

Where a complaint set up simple negligence, or wilful,

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wanton or reckless conduct on the part of the defendant, and an amendment charged that the damages were caused by wilful, wanton or reckless conduct on the part of the defendant's servant, the court held that the amendment set up a new ground of liability, and, in determining whether the action was barred by limitations, the time should be calculated up to the date of filing the amendment. *Freeman v. Central of G. R. Co.*, 154 Ala. 619, 45 So. 898.

In *Whalen v. Gordon*, 95 Fed. 305, Judge Sanborn, writing the opinion, said: "An amendment to a petition, which sets up no new cause of action or claim, and makes no new demand, but simply varies or expands the allegation in support of the cause of action already propounded, relates back to the commencement of the action, and the running of the statute against the claim so pleaded is arrested at that point. But an amendment which introduces a new or different cause of action, and makes a new or different demand, does not relate back to the beginning of the action, so as to stop the running of the statute, but is the equivalent of a fresh suit upon a new cause of action, and the statute continues to run until the amendment is filed; and this rule applies although the two causes of action arise out of the same transaction, and, by the practice of the state, a plaintiff is only required in his pleading to state the facts which constitute his cause of action."

Appellant also cites the case of *Van de Haar v. Van Domseler*, 56 Ia. 671. In that case the original petition charged the defendant with seduction, and the amended petition charged him with rape. It was there held that as there was but a single transaction there could not be but a single cause of action, and as the charge of rape was made for the first time when the amended petition was filed, such cause of action was barred, and the demurrer correctly sustained. That case has been cited a great many times under decisions on this subject, and the reasoning there seems applicable to the case now under consideration.

In *Johnson v. American Smelting & Refining Co.*, 80 Neb. 255, it was said: "What is a cause of action? We must keep in view the difference between the subject of action and the cause of action. The subject of action is what was formerly understood as the subject matter of the action. * * * The cause of action is the right claimed or wrong suffered by the plaintiff, on the one hand, and the duty or delict of the defendant, on the other, and these appear by the facts of each separate case." It was further said: "In an action to recover damages for negligence, 'the cause of action,' as used in pleading, is not the injury wrongfully inflicted through defendant's negligence, but is the fact or facts that justify the action, or show the right to maintain it." On page 258 of the opinion, it was said: "The cause of action in any case embraces not only the injury which the complaining party has received, but it includes more. All the facts which, taken together, are necessary to fix the responsibility are parts of the cause of action." This appears to be a true definition of a cause of action, and a cause of action has never consisted simply of negligence or duty or injury standing alone. All of these three things must be combined, and when one of the elements of the combination is charged a change takes place in the cause of action itself. This rule is followed in *Langenfeld v. Union P. R. Co.*, 85 Neb. 527, where it is said: "In order to constitute actionable negligence, there must exist three essential elements, namely, a duty or obligation which the defendant is under to protect the plaintiff from injury; a failure to discharge that duty; and injury resulting from the failure." In this case the original petition stated a cause of action against the defendants based on a violation of their duties as master. The violation of those duties constituted the cause of action. In the amended petition the attempt to recover upon that basis and for a violation of that duty was abandoned, and necessarily so, otherwise a directed verdict would have resulted. A new and different duty measured by other and different rules

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is claimed to have been violated by the defendant under the amended petition, and the recovery is sought for a violation of those duties and obligations against the defendants as the owners of the premises and inviters to the plaintiff, Westover, as an invitee. It will not be claimed that a petition could present both causes of action, and that the two causes of action could be tried and submitted to the same jury. The time came when the plaintiff was obliged to choose between an attempt to hold the defendants for a violation of their duty to him as his master, and for a violation of their duty to him as the owner of the premises extending to him an invitation thereon. In the first case he attempted to recover because he was injured, and because of a violation of the duties of the defendants as master to plaintiff as their servant. In that cause of action he failed, and in the present case he seeks to recover because he was injured, and because of the violation of the duty of the defendants as owners of the premises and inviters, and himself as invitee. The cause of action resulting from the violation of that duty was not presented until more than four years after it had accrued, if it ever existed.

Counsel for plaintiff cite and rely largely upon *Gatta v. Philadelphia, B. & W. R. Co.*, 24 Del. 293, 76 Atl. 56. In that case the original petition alleged that the decedent was an employee of the defendant railway company, and a recovery was sought on that theory. An amended petition was filed alleging that plaintiff's intestate was not an employee of the defendant company, but was an employee of the Pullman company, and that the defendant was engaged in hauling the cars of the Pullman company, and charged negligence because the defendant did not warn plaintiff of the movement of the cars. It was held that the new petition did not state a new cause of action because it did not involve any change in the subject matter of the action, but was merely a variation in stating the cause of action, and corrected a misdescription of the same cause of action; that the imperfect state-

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ment of the cause did not cause the correct statement of it to be a different cause of action, and did not convert the original suit into a new and different one, and therefore the plea of the statute of limitations was overruled.

We think that case is fairly distinguishable from the one at bar; but it may be conceded that there is a division of the authorities upon this question, caused largely by the language of the codes of the different states relating to the question of amendments. But, so far as we have been able to review the authorities, it seems clear that the great weight of authority sustains the contention of the defendants that the amended petition stated a new and different cause of action, and the new cause of action was barred by the statute of limitations.

It follows that the plea of the statute should have been sustained, and the jury should have been directed to return a verdict for the defendants. By thus disposing of the main question presented by the appellants, a discussion of the other errors assigned are rendered unnecessary.

The judgment of the district court is reversed, and the plaintiff's action dismissed.

REVERSED AND DISMISSED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

STATE OF NEBRASKA V. FRANK T. FREIBURGHOUSE.

FILED NOVEMBER 12, 1913. No. 18,052.

Intoxicating Liquors: INDICTMENT: DUPLICITY. Under the provisions of section 8, ch. 50, Comp. St. 1911, each act of selling any of the liquors named in the section, as well as the act of giving away any of them to a minor, is a crime. An indictment which charges in the same count the selling and giving to a minor any of the liquors named in the section is defective, and it is not error to sustain a motion to quash the indictment for duplicity. *State v. Pischel*, 16 Neb. 490; *Smith v. State*, 32 Neb. 105.

ERROR to the district court for Sheridan county: WILLIAM H. WESTOVER, JUDGE. *Exceptions overruled.*

Alden C. Plantz and M. F. Harrington, for plaintiff in error.

Roscoe L. Wilhite and Fisher & Rooney, contra.

BARNES, J.

It appears that at the April, 1913, term of the district court for Sheridan county there was returned by the grand jury an indictment containing ten counts each, charging that one Frank T. Freiburghouse, at the dates and times therein specified, did unlawfully sell and give to certain minors, named therein, spirituous and intoxicating liquors, the defendant then and there being a person licensed to sell such liquors within the village of Rushville, in Sheridan county, Nebraska. To this indictment a motion to quash the several counts contained therein because the same were "duplicitous," among other things, was sustained. The county attorney excepted, and has brought his exceptions to this court.

In *State v. Pischel*, 16 Neb. 490, it was said: "Under the provisions of section eleven of the license law of this state, each act of selling any of the liquors named in the section is an offense, punishable by indictment. An indictment which charges the selling and giving away of all the liquors named in the sections with a *continuando*, held bad."

The question was again before the court in *Smith v. State*, 32 Neb. 105. In that case Judge NORVAL wrote the opinion, and it was there held: "Under the provisions of section 11 of chapter 50 of the Compiled Statutes, each act of selling any of the liquors named in the section, as well as the act of giving away any of them without a license so to do, is a crime. An information which charges in the same count the selling and giving away of two or more of the liquors named in the section is defective, and

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is liable to a motion to quash"—citing *State v. Pischel*, 16 Neb. 490. That decision contains our last expression on the question presented by the exception.

It is contended by the county attorney that in *Johnson v. State*, 88 Neb. 328, a different rule was established. We do not so understand that case. There the defendant was indicted for a violation of section 6 of the criminal code, and it was there said: "An indictment under section 6 of the criminal code should not charge in the same count that the defendant used and employed, and advised to be used and employed, instruments to procure an abortion, but such an indictment is not demurrable for duplicity, since the allegation that defendant advised such instruments to be used and employed does not state an offense without alleging that some person other than the defendant committed the act; it is immaterial that the defendant advised the act which he committed himself, and such allegation should be rejected as surplusage."

Again, it is clearly provided by section 8, ch. 50, Comp. St. 1911, that to sell intoxicating liquors to a minor is an offense, and it is equally clear that it is made an offense to give such liquor to a minor. Therefore an indictment which charges both the selling and giving of such liquors to a minor in the same count is "duplicitous," and the charge is also uncertain in its effect.

Many cases from other jurisdictions are cited in support of the exception, and we think it may be conceded that if the question were now before this court for the first time the indictment might not be held to be "duplicitous;" but we decline to overrule *State v. Pischel*, and *Smith v. State*, *supra*, and thus sustain the exception. The practice seems to have been well settled and thoroughly understood by the district courts of this state, and it would hardly be fair to the trial court to establish a new rule at this time. Therefore, in view of the situation, the exceptions are not sustained.

EXCEPTIONS OVERRULED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

VALPARAISO STATE BANK, APPELLANT, v. JUL PETER-
MICHEL ET AL., APPELLEES.

FILED NOVEMBER 12, 1913. No. 17,355.

1. **Husband and Wife: TRANSACTIONS BETWEEN: BONA FIDES: EVIDENCE.** Where the undisputed evidence shows that a judgment debtor is in possession at his home, and in such control of money in the form of bills that his wife, at his express direction, deposits a part of it as indemnity for his release on bail, and his wife afterwards, in a controversy with his creditors, claims that the money is hers, but does not so testify, the principle that transactions between husband and wife by which creditors are prevented from collecting their just dues will be scrutinized closely, and proof of their *bona fides* required, will be applied.
2. ———: ———: **EVIDENCE.** In such a case, *held* that the dominion and control over the fund exercised by the husband establishes *prima facie* his ownership of the money, in the absence of any evidence to the contrary.

APPEAL from the district court for Saunders county:
GEORGE F. CORCORAN, JUDGE. *Reversed.*

E. J. Clements, for appellant.

G. W. Simpson and *G. H. Simpson*, *contra*.

LETTON, J.

This is an action against garnishees on account of unsatisfactory answers in garnishment proceedings. The appellant is a judgment creditor of C. J. Schwartz. On August 30, 1909, an execution was issued on the judgment, which was returned unsatisfied. On the same day an affidavit in garnishment was filed, and a summons in garnishment issued and served on the Oak Creek Valley Bank and Jul Petermichel as garnishees. On November 22, 1909, the bank and Petermichel appeared as directed, and answered as garnishees that they had no money or property of C. J. Schwartz in their possession or under their control. On August 28, 1909, C. J. Schwartz, who

Valparaiso State Bank v. Petermichel.

is the husband of the appellee, Betty Schwartz, was arrested, charged with a violation of the liquor laws of the state, and was taken by the sheriff to Wahoo, the county seat. At the time of his arrest he desired to give bond, and in the presence of the sheriff he called Mr. Petermichel, who is the cashier of the Oak Creek Valley Bank at Valparaiso, by telephone, told him he was under arrest and had to give a \$500 bond, and asked Petermichel to furnish it. Mr. Petermichel testifies that he told him he could not do so unless Schwartz put up a cash deposit; that Schwartz then told him to see Mrs. Schwartz; that he went to see her at the restaurant in Valparaiso, which was the home of Mr. and Mrs. Schwartz; that Mrs. Schwartz went into the back room of the restaurant, and brought in and handed to him a roll of bills of about \$550; that he took \$500, and returned the balance to her. He further testified that at the time the summons in garnishment in this case was served upon him he still had the \$500 in his possession. On cross-examination he stated that it was after Mrs. Schwartz talked to her husband over the telephone that she procured the money. He also stated there was no order made by the court in the garnishment proceedings, and that he had been released from liability on the bond in the criminal prosecution; that afterwards he received an order from Mrs. Schwartz requesting him to turn over to Simpson & Good the \$500 placed in his hands as security as soon as he was released from liability, and that on December 14, 1909, a draft for \$500 was drawn on him by Simpson & Good, which was paid and charged to his account; that he received the draft and the order from Mrs. Schwartz on the same day, and that Simpson & Good guaranteed that if he had to pay the money they would repay it to him.

The sheriff testified that he heard one side of the conversation which Schwartz had over the telephone with Petermichel and Mrs. Schwartz; that Schwartz told his wife that he had been arrested and would have to lie in jail unless he was able to give a bond; that he had spoken

to Petermichel, who had demanded indemnity, and that she told her to go in the back room and get \$500 out of the money and bring it over to the Oak Creek Valley Bank and deposit with Jul Petermichel."

Plaintiff then called Mrs. Schwartz as a witness, endeavored to elicit by a series of questions, and offered to prove, that she had the telephone conversation with Schwartz with regard to furnishing a bond, and that at his request she deposited in the hands of Petermichel \$500 of his money. Objections to the questions and to the offer of proof were made on the ground that the wife was incompetent to testify against her husband; that the transaction and conversation was a communication between husband and wife, to which she is incompetent to testify during the time that the marriage relation existed. The objection and the offer to prove were sustained, to which plaintiff excepted. No further evidence was produced, and the court found for defendants and dismissed the case.

The answer of the garnishees alleges that the answers made by them in the proceedings were truthful, and that the district court made no order upon them in the case. The answer of Mrs. Schwartz pleads that she is the owner of the \$500; that the money was her separate estate and did not come to her from her husband; and that the indebtedness of the other defendants created by depositing the money is due to her alone. Plaintiff's reply denied the affirmative allegations in the answer.

The appellant maintains that the uncontradicted evidence shows that the money belongs to C. J. Schwartz. He also relies upon the principle that transactions between husband and wife by which creditors are prevented from collecting their just dues will be scrutinized closely and proof of their *bona fides* required. *First Nat. Bank v. Bartlett*, 8 Neb. 319; *Lipscomb v. Lyon*, 19 Neb. 511; *Hill v. Fouse*, 32 Neb. 637.

Schwartz did not request that his wife deposit *her* money as security. He merely directed her to "go into the back room and get \$500 out of the money * * *

and deposit it with Jul Petermichel." He also directed Petermichel to go to Mrs. Schwartz, who, apparently in obedience to her husband's direction, went to the back room, procured the money, and delivered it to him. The fact that Schwartz had such power and control over the money as to govern its disposition is a strong indication that it belonged to him. Apparently it was in his possession at his home and subject to his authority. Counsel for appellant suggests the query that, if he had telephoned to a son, a daughter, or an employee, the identical instructions which he gave his wife, and they had procured the money and deposited it in the same manner as Mrs. Schwartz did, no further proof being offered as to ownership, would any one question that the money belonged to Schwartz? We are of opinion that the facts related being undisputed, and no other evidence as to ownership being before the court except that Mrs. Schwartz afterwards gave her attorneys an order for it, the court erred in finding for the defendants. The fact that Mrs. Schwartz failed to testify that the money was hers is also entitled to some weight in considering this question. Her silence seems inconsistent with her claim of ownership.

Having reached this conclusion, it is unnecessary to consider the question as to whether Mrs. Schwartz was a competent witness.

Appellant takes the position that this is an action in equity which this court tries *de novo*, and that if we find the evidence is sufficient we should proceed to enter a decree in its favor. In this we think he is mistaken. An action against a garnishee for a false or unsatisfactory answer in proceedings in garnishment merely is a suit at law ancillary to the main case in which the judgment is rendered. Perhaps upon a new trial Mrs. Schwartz may be able to prove by sufficient competent evidence that the money actually belonged to her. For these reasons, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

Maynard v. Nemaha Valley Drainage District.

S. W. MAYNARD ET AL., APPELLANTS, V. NEMAHA VALLEY
DRAINAGE DISTRICT, APPELLEE.

FILED NOVEMBER 12, 1913. No. 17,387.

1. Eminent Domain: DRAINAGE: REMOVAL OF DAM: MEASURE OF DAMAGES. The proper measure of damages on appeal from condemnation proceedings to remove a mill-dam is the difference between the value of the mill property before the removal of the dam and loss of the water-power and its value after the removal has taken place.
2. ———: ———: ———: ———: PROSPECTIVE PROFITS. Prospective profits which may in the future be derived from the use of the water-power for the development of electricity are too remote and speculative to be taken as elements of damage, where there is no proof of a present and immediate intention and purpose to make such development.

APPEAL from the district court for Nemaha county:
LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

S. P. Davidson and William G. Rutledge, for appellants.

Kelligar & Ferneau, contra.

LETTON, J.

This is an appeal from condemnation proceedings brought to remove a mill-dam in the Nemaha river which was appurtenant to a small flouring mill of appellants, for the reason that the dam is so located that it obstructs the main channel of the proposed ditch improvement. Appraisers were appointed by the county court. They appraised the damages occasioned by the removal of the dam at \$3,500. From this appraisal an appeal was taken to the district court, where, after a trial, judgment was rendered for the same sum.

At the trial a number of witnesses were called by appellant to testify as to the value of the dam. One Beardsley, an expert hydraulic engineer, testified that the water-

power, if it was fully developed for the generation of electric power and connections made with various towns in the vicinity, was actually worth \$135,000. Another engineer, after testifying to the size of the dam, the extent of the drainage area of the stream, and the amount of power the dam would develop, was asked what the dam was worth. An objection was interposed that the witness had not shown himself competent to answer, and that the question was irrelevant, immaterial and incompetent. The objection was sustained. Appellants then offered to prove that the value of the dam, estimated from the amount of power it produced at the normal flow of the river and with the development existing before its removal, was \$35,000. This testimony was excluded. Appellants also offered testimony to show that the additional cost of running the mill by steam power over the cost of running it by water-power for each year would not be less than \$1,425, as affording a basis upon which to estimate the value of the dam. The exclusion of this evidence is the chief complaint of appellants.

The determining question is what is the proper measure of damages for the removal of a dam which is appurtenant to a flouring mill. The rule which seems to have been adopted by most courts is the difference between the market value of the property before the power is destroyed and afterwards. Mr. Farnham, in speaking of the measure of damages for the diversion of waters generally, says: "If the diversion is permanent and cannot be suppressed, the measure of damages is the difference in value of the property immediately before and immediately after the diversion of the water is effected, or the value of the land with the water flowing to it and its value without such flow." 2 Farnham, Waters, sec. 510. With reference to the destruction of a water-power, the supreme court of errors of New Jersey lays down the rule as follows: "In ascertaining just compensation for the diversion of water from a mill, the difference between the market value of the mill before the diversion and its market value afterwards

is usually a simpler and safer criterion than estimates of the probable cost of producing by steam at the mill the power which the diverted water would supply, and than estimates of the probable value of the water-power at the mill, based on the rental value of power at other places more or less distant and dissimilar." *Sparks Mfg. Co. v. Newton*, 60 N. J. Eq. 399. This seems to be the general rule. *Lee v. Springfield Water Co.*, 176 Pa. St. 223; *Illinois C. R. Co. v. Smith*, 110 Ky. 203; *City of Syracuse v. Stacey*, 169 N. Y. 231, affirming 45 N. Y. App. Div. 249; *Illinois C. R. Co. v. Village of Lostant*, 167 Ill. 85. "Proof must be limited to showing the present condition of the property and the uses to which it is naturally adapted. It is not competent for the owner to show to what use he intended to put the property, nor what plans he had for its improvement, nor the probable future use of the property. Nothing can be allowed for damages to an intended use." 2 Lewis, Eminent Domain (3d ed.) sec. 709 (480).

It seems clear that an estimate of the value of the property based upon or considering as an element of value what it would be worth after costly and valuable improvements and additions had been made to it, or upon a use not contemplated by its owner in the near future, is so speculative and remote and depends so much upon other factors and contingencies that it really affords no criterion of its present value. *Illinois C. R. Co. v. Chicago*, 169 Ill. 329. It is evident that the damages cannot be more than the value of the whole property before it is interfered with by the improvement, and cannot be less than the depreciation in money value after the improvement has been made. The difference in the value of the whole property before and after the dam was taken out was the measure of damages adopted by the trial court, and this we believe to be the proper rule.

The evidence shows that the erosion of the fertile soil of the Nemaha valley and its consequent deposit in the bed of the stream has seriously interfered with the capacity of the river to furnish water-power. This fact was

taken into consideration by the witnesses for the appellee and by the court in estimating the value of the property before and after the destruction of the dam.

We find no error in the ruling of the court upon the points complained of. The judgment is supported by the evidence, and is therefore

AFFIRMED.

BARNES, ROSE and SEDGWICK, JJ., not sitting.

COMMONWEALTH POWER COMPANY, APPELLANT, v. STATE BOARD OF IRRIGATION, HIGHWAYS AND DRAINAGE, APPELLEE.

FILED NOVEMBER 12, 1913. No. 18,116.

1. **Waters: IRRIGATION: "APPROPRIATION."** Under that portion of the irrigation statutes of Nebraska (Comp. St. 1911, ch. 93a) which deals with the procedure necessary to procure water rights after the law of 1895 went into effect, the word "appropriation," used in its strictest sense, denotes an appropriation which has been legally initiated by the filing of an application with the state board of irrigation, highways and drainage, and the granting of a permit by that body, and completed by the construction of the works as specified therein, and the application of the water to a beneficial use within the time limited in the permit, or subsequent extensions. But, while this is the meaning of the word "appropriation" when used in the statute in its most exact and proper sense, it is often more loosely used to mean the contingent or inchoate right to an appropriation and the right of priority, derived under a permit from the state board.
2. ———: ———: **APPLICATION: PRIOR RIGHT.** A permit had been granted to an applicant for practically all the unappropriated water in a stream to be used for the development of power, which permit was still in force and effect. A subsequent application for the same amount of water, to be diverted above the proposed head-gate of the prior applicant, for the same purpose, and at a point in proximity thereto, was refused by the state board, for the reason that the rights asked were approximately the same as already granted under the prior application, and in conflict therewith. *Held*, That the action of said board and of the district

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court in affirming its order in the premises were justified by the facts.

3. ———: ———: **PAYMENT OF FEES.** Under the provisions of section 8a, art. II, ch. 93a, Comp. St. 1911, it is the imperative duty of the secretary of the state board of irrigation, highways and drainage to pay the money received for fees for filings for water to the state treasurer. No right can be predicated as against the board by reason of the secretary complying with this direction.

APPEAL from the district court for Nance county:
GEORGE H. THOMAS, JUDGE. *Affirmed.*

C. C. Flansburg and Leonard A. Flansburg, for appellant.

Grant G. Martin, Attorney General, and George W. Ayres, contra.

LETTON, J.

On September 30, 1912, the Commonwealth Power Company, appellant, filed its application No. 1,229 with the State Board of Irrigation, Highways and Drainage seeking to divert 2,700 second feet of the waters of the Loup river for power and other purposes, and at the same time paid the state engineer the lawful fees for such filing in the sum of \$2,150. The board dismissed this application on November 25, 1912. From this dismissal an appeal was taken to the district court for Nance county, where the action of the state board was affirmed. From this judgment said company has appealed to this court.

As a result of an examination of applications previously granted for water from the Loup river for irrigation and power purposes, made by the state engineer, a citation was served upon all persons claiming a right to the waters of the river under these applications to show cause by a certain date why the permits granted should not be canceled and annulled. A hearing was had as specified. The Nebraska Power Company, appeared, claiming rights under a number of the applications. The Commonwealth Power Company, appellant, also appeared by its counsel

adversely to the Nebraska Power Company. On September 30, 1912, the whole matter was finally submitted on the evidence. On the same day the appellant filed application No. 1,229 and paid to the state engineer \$2,150 filing fee. This sum was paid into the state treasury by the state engineer, as required by law, where it is still retained. On November 25, 1912, the board found that all applications under which the Nebraska Power Company claimed were lapsed, except application No. 709, as to which it found that a portion of the work had been performed. An application for extension of time having previously been filed, the board extended the time for construction under this application for six months, and provided that at the expiration of that time, if a showing was made that the project would be completed within two years of the date of the hearing, a further extension would be granted.

On the same day the board found and determined that the rights asked for under application No. 1,229 by the appellant "are approximately the same as have already been granted to the Nebraska Central Irrigation Co. (H. E. Babcock) under application No. 709 and the two are in conflict," and the application of appellant was dismissed. The record also shows that application No. 1,029 was filed with the board on September 30, 1910, by one Koenig asking for 3,200 cubic feet of water per second, taking water near the same point of diversion as applications No. 709 and No. 1,229; that, the title to application No. 1,029 being in litigation, the board took no action, leaving the matter to be disposed of after the supreme court had rendered its decision in the case.

The average flow of the Loup river for nine months in the year at and near the respective diversion points named in these applications is 2,700 cubic feet per second. The point of diversion of application No. 1,229 is a little above and the place of return of the water to the river is far below the diversion points of Nos. 709 and 1,029 so that its allowance and the completion of the work would take

all the water specified in Nos. 709 and 1,029. If the works are completed and the water applied to a beneficial use under application No. 709 within the time limited there will be no unappropriated water in the river susceptible of being granted either to Koenig or the appellant.

The appellant's contention is that there can be no appropriation until the works are completed and the water applied to a beneficial use, and that since, without taking into consideration permit No. 709, there was sufficient unappropriated water in the Loup river to satisfy the amount requested in its application No. 1,229, the board erred in refusing its application. Much of appellant's argument is devoted to establishing a proposition which needs no argument, namely, that, in cases arising under that portion of the irrigation act of 1895 which deals with water rights to be acquired thereafter, an appropriation is not perfect and complete until the works are completed and the water is applied to a beneficial use. Used in its strictest sense under such a statute the word "appropriation" denotes an appropriation which has been legally initiated by the filing of an application for a permit with the state board, the granting of a permit by that body, the construction of the works as specified therein, and the application of the water to a beneficial use within the time limited in the permit or subsequent extensions. The initial step is the application for the permit. Its issuance gives the applicant a contingent or conditional right which becomes a final and complete appropriation only when the works are completed and the waters beneficially used. It also confers upon him the prior right to the water against all subsequent applicants during the progress of the work if he finally fulfil the conditions of the permit. But, while this is the meaning of the word "appropriation" when used in the statute in its most exact and proper sense, it is often more loosely used to mean the contingent right to an appropriation and the right of priority derived under a permit from the state board. It is so used in the statute itself. In section 28, ch. 93a, art. II, Comp.

St. 1911, it is provided that applications to appropriate water shall upon being accepted "take priority as of date of original filing subject to compliance with the future provisions of the law and the regulations thereunder. If there is unappropriated water in the source of supply named in the application, and if such appropriation is not otherwise detrimental to the public welfare, the state board, through its secretary, shall approve the same by indorsement thereon, etc. * * * The priority of such appropriation shall date from the filing of the application in the office of the state board. * * * If there is no unappropriated water in the source of supply, or if a prior appropriation has been made to water the same land to be watered by the applicant, the state board, through its secretary, shall refuse such appropriation and the party making such application shall not prosecute such work so long as such refusal shall continue in force." In the next section (section 29), requiring the filing of a map or plat of the work within six months from the allowance of the application, it is provided: "A failure to comply with this section shall work a forfeiture of the appropriation and all rights thereunder." In section 62, providing that the work under a permit shall be begun within six months after the approval of the application, it is also specified: "A failure to comply with this section shall work a forfeiture of the appropriation and all rights thereunder." In these sections the word "appropriation" seems to be used more loosely to denote the prior right to an appropriation which has been obtained by virtue of an application being granted and a permit issued. This is not an unusual use of the term. "'Appropriation,' as applied to water rights, is often loosely used by the authorities, and in general it is used with reference to a claim to the use of the water of a public stream from the time of the inception of the right, at all the intermediate stages, and down to the time when the last act is accomplished by which the right is finally and completely secured." 1 Words and Phrases, p. 473, and cases cited.

An applicant who obtains a permit under the statute acquires thereby a contingent "appropriation" to the extent of his grant which gives him the prior right to the use of this water against all subsequent claimants. It is in effect pledged to him for the period of time fixed by the board within which he may complete and perfect the appropriation, and is an "appropriation" to that extent, but no more.

The state board pleads that the allowance of appellant's application would be "detrimental to the public welfare," which is one of the grounds upon which it may, under the statute, refuse a permit. It no doubt considered the fact that in all probability the allowance of two or more conflicting permits to the use of all available water at or near the same point of diversion would result in defeating all projects. Capital is timid and would be very apt to be loth to enter into the development of the water-powers of the state if it were subject to the conflicts, litigation and interference with its work that would probably result if such a construction was given to the statute. The object of the law is to encourage and not to hinder the development of the state by the use of its waters for the purposes of agriculture or the generation of power, and the board was entitled to consider whether the allowance of conflicting claims to the same water at practically the same place would tend to accomplish or defeat the legislative purpose. *Young & Norton v. Hinderlider*, 15 N. M. 666, 110 Pac. 1045.

We think the board was justified in refusing to grant appellant's application, and the district court was right in affirming its order.

While it seems unjust that the state should retain the \$2,150 paid by the applicant, under the provisions of section 8a, art. II, ch. 93a, Comp. St. 1911, it was the imperative duty of the secretary of the board to pay the money to the state treasurer at the end of the month. No rights can be predicated as against the board by reason of the secretary complying with this direction.

Gielen v. City of Florence.

For these reasons, the judgment of the district court is

AFFIRMED.

BARNES, J., not sitting.

KATHERINE GIELEN, APPELLEE, v. CITY OF FLORENCE,
APPELLANT.

FILED NOVEMBER 12, 1913. No. 17,354.

Municipal Corporations: INJURY TO PEDESTRIAN: QUESTIONS FOR JURY.

In an action against a city for damages for personal injuries resulting from plaintiff's having stumbled at night over a pile of bricks which had been allowed to remain for two weeks on a sidewalk continually used by the public, whether the obstruction existed for a length of time sufficient to charge the city with notice, whether the city was negligent in failing to restore the sidewalk to a reasonably safe condition for travel before plaintiff was injured, and whether plaintiff, who knew two or three weeks before the accident that single bricks were scattered along the sidewalk, but had no later knowledge of conditions, was guilty of contributory negligence, *held* to be questions for the jury.

APPEAL from the district court for Douglas county:
WILLIAM A. REDICK, JUDGE. *Affirmed.*

C. W. Haller and C. E. Herring, for appellant.

W. W. Slabaugh, contra.

ROSE, J.

While walking on a sidewalk in Florence, plaintiff stumbled on a pile of eight or ten bricks and was severely injured. This is an action against the city to recover resulting damages in the sum of \$3,000. From judgment on a verdict in favor of plaintiff for \$2,900, defendant has appealed.

The principal ground urged for a reversal is that the verdict is contrary to the evidence. In discussing this assignment, defendant asserts that there is no disputed

question of fact; that the obstruction of the sidewalk was a necessary one preparatory to paving; that plaintiff abandoned a safe and direct route to her destination on the evening of the accident, and that, with full knowledge of the existing conditions at the place of the injury, she deliberately selected the route leading thereto and assumed the incidental risks, being guilty of contributory negligence.

The accident occurred on Main street after dark, March 31, 1910. For several months preceding that date all of the sidewalk along the block where plaintiff was injured, except a space about 18 inches wide, had been covered with a solid row of bricks four or five feet high. They had been piled there by a city contractor preparatory to paving Main street, which was temporarily closed between the curbs. During the winter, single bricks were scattered along the unoccupied portion of the sidewalk, though it had been left open and was continually used by pedestrians. In the daytime, two or three weeks before plaintiff was injured, she had used the same sidewalk and had observed the conditions described. In addition, there is proof of the following facts: While walking carefully on the sidewalk at night plaintiff stumbled on a pile of eight or ten bricks. The pile was a new obstruction of which she had no knowledge. She could not see it at night, because it was in the shadow of the row of bricks which partially covered the sidewalk. It was not there when she last passed that place. It had been allowed to remain on the sidewalk about two weeks. In view of such evidence, did the obstruction remain on the sidewalk a length of time sufficient to charge the city with notice? Was the city negligent in failing to restore the sidewalk to a reasonably safe condition for travel before plaintiff was injured? That these questions were for the jury is shown by many adjudicated cases. *Smid v. Mayor*, 17 Jones & S. (N. Y.) 126; *Kunz v. City of Troy*, 1 N. Y. Supp. 596; *Foels v. Town of Tonawanda*, 75 Hun (N. Y.) 363; *Briel v. City of Buffalo*, 90 Hun (N. Y.) 93; *City of Palestine*

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v. Hassell, 15 Tex. Civ. App. 519, 40 S. W. 147; *City of Fort Wayne v. Duryee*, 9 Ind. App. 620; *Norton v. Kramer*, 180 Mo. 536; *Wedderburn v. City of Detroit*, 144 Mich. 684; *City of Aurora v. Cox*, 43 Neb. 727.

If the row of bricks on the sidewalk was a necessary obstruction, the pile of eight or ten on the unoccupied portion was not. The evidence was sufficient to justify a finding that the city was chargeable with notice, and that it was negligent in failing to remove the unnecessary obstruction before plaintiff was injured. It should not be decided as a matter of law, therefore, that she was guilty of contributory negligence because she did not act on the assumption that the city would allow the dangerous conditions to continue an unreasonable length of time, and select a different route. She testified, in effect, that she was careful, because she had known that single bricks had been scattered along the sidewalk, but that the obstruction of a pile of eight or ten bricks was a new danger of which she had no knowledge. It follows that the trial court did not err in allowing the jury to determine the questions as to negligence and as to contributory negligence. In this view of the case the instructions are not open to criticism, though some of them are challenged as erroneous.

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

CHARLES DENGLE, APPELLANT, v. FRANK FOWLER ET AL,
APPELLEES.

FILED NOVEMBER 12, 1913. No. 17,373.

1. **Vendor and Purchaser: CONTRACT: EVIDENCE.** By exchange of letters in due course of mail, the writers may enter into a valid contract for the sale of land.
2. **Landlord and Tenant: LEASES: OPTION TO PURCHASE.** In a written

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land lease, an option granting to lessee, upon expiration of the stipulated term, the right to purchase the land upon definite terms, is an enforceable contract.

3. ———: ———: ———: CONSIDERATION. A five-year land lease may be modified after its execution, so as to grant to lessee an enforceable option, upon expiration of the lease, to purchase the land on definite terms, and for that purpose the rentals stipulated in the original lease and the subsequent promise to pay the purchase price are valid considerations.
4. ———: POSSESSION AS NOTICE. The possession of a tenant is not only notice to the world of his rights as lessee, but is notice of all other interests of which inquiry would elicit knowledge.
5. Vendor and Purchaser: RIGHTS OF LESSEE. A purchaser of land, in possession of a tenant who was not asked about his interests in the demised premises, is bound by all of the equities enforceable by the lessee against the vendor.
6. ———: ———. The notice imparted by a recorded lease for a five-year term does not put an end to inquiry as to the rights of a tenant who, for a long period of years, has been in possession of the demised premises, where he is conducting a store in buildings erected at his own expense.
7. ———: ———. Purchasers of land, with notice that a lessee in possession has an option to buy the demised premises at the expiration of his lease, may be required to perform lessor's agreement to convey the lot to lessee.

APPEAL from the district court for Dodge county: CONRAD HOLLENBECK, JUDGE. *Reversed with directions.*

Burr, Greene & Greene, F. Dolezal and George L. Loomis, for appellant.

Courtright & Sidner, contra.

ROSE, J.

This is a suit for specific performance of a contract obligating Martha E. Green, a resident of Utica, New York, to sell and convey to plaintiff a lot in Fremont, Nebraska. As her tenant he was in possession of the lot for many years, where he conducted a retail furniture business in a building erected at his own expense. The last

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lease executed by them is in writing, is dated May 14, 1905, and is duly recorded. It covered the period from June 1, 1905, to June 1, 1910, required plaintiff to pay to lessor quarterly an annual rental of \$150, and prescribed conditions under which he was permitted to remove his improvements. He is still in possession. He pleads in his petition that, by exchange of letters soon after the execution of this lease, he and lessor agreed that, upon expiration of the five-year term, she should sell and convey the demised property to him for \$3,000, one-third of the purchase price to be paid in cash, and the balance to be secured by a mortgage on the premises, to be payable in 10 years, and to draw interest at the rate of 6 per cent. per annum. Plaintiff further pleads that, with knowledge of his rights, Frank Fowler, defendant, procured from Martha E. Green, lessor, April 12, 1910, in the name of his wife, Jessie Fowler, defendant, a deed to the leased lot, and that grantee holds the title subject to plaintiff's right of purchase. Defendants denied the existence of the agreement on which plaintiff relies, alleged they bought the lot in good faith from lessor for \$3,600, asked to have grantee's title quieted, and demanded damages on account of the failure of plaintiff to surrender possession June 1, 1910. The findings of the trial court were in favor of defendants on all of the issues raised by the answer, and from a judgment in their favor plaintiff has appealed.

Did lessor and plaintiff make the agreement pleaded in the petition? Was there a valid consideration? Did defendants purchase the lot with notice of plaintiff's rights? These questions are to be determined from the evidence. Plaintiff insists that he proved his contract by the exchange of letters in due course of mail. A binding agreement may be thus established. *Helwig v. Aulabaugh*, 83 Neb. 542. Some of the correspondence is missing, but plaintiff testified orally to the contents of letters not produced. In the testimony the right asserted by plaintiff is frequently called an "option," and defendants suggest that the use of such a term is an intimation that no enforceable

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contract was made. The suggestion, however, is not important. In equity the term employed by a party to describe a transaction is not controlling. The inquiry should be directed to what the parties agreed to do. Plaintiff testified, without contradiction, that his transactions with lessor were limited to the lot in controversy. That their correspondence related thereto will be taken for granted, since there is nothing to the contrary in the record. Plaintiff had been transacting business in the name of his wife, M. L. Dengler, and from all of the evidence it is clear that letters addressed to her in answer to his own should be considered a part of his correspondence. For 25 years lessor owned the lot, while plaintiff occupied it with his buildings and retail furniture store. When her Fremont agent presented to him for his signature a lease covering the period from June 1, 1905, to June 1, 1910, it contained a provision requiring him to vacate the premises upon 6 months' notice, in case of a sale. The evidence is conclusive that he refused to make the lease on such terms, and that he signed it after this provision was erased. On the witness-stand he said that in May, 1905, after execution of the lease, he sent a letter to lessor at her proper address in Utica, New York, containing, in substance, these words: "Have seen in lease that you want to sell the lot. Will you please give me best terms and price on the same?" In reply he received a letter directed to M. L. Dengler. It was dated May 24, 1905, and in part reads thus: "In reply to your letter would say that the best that I can do on a sale is \$3,000, you to pay \$1,000 down, and the other \$2,000 to be covered by a mortgage. I will pay for the selling of the property. Have written Courtright & Sidner this day." The original letter is in evidence. The partners mentioned were lessor's agents for the purposes of lease and sale. She gave her deposition. It shows that she directed the writing of the letter described. Plaintiff says he made the following reply thereto, but did not keep a copy of it: "I have not got any money just now to buy lot, but will buy same after expiration of my lease. Please

give me best price and terms on same." He testified this was answered June 13, 1905, as follows, in a lost letter signed by lessor and received by him: "I will sell you lot for \$3,000, \$1,000 paid down, and \$2,000 payable in ten years at 6 per cent. interest, and I will pay commission for selling it." He further stated that in a letter properly addressed to her and posted, he afterward wrote: "I hereby accept your offer for lot." Two witnesses testified they had seen lessor's letter containing the option which permitted plaintiff to buy the lot at the expiration of his lease for \$3,000, one-third to be paid in cash, and the balance to be secured by mortgage. One of the witnesses gave the rate of interest on the deferred payment at 6 per cent. and the other at 5 per cent. To others plaintiff asserted the existence of this option before the time to exercise it had expired. While lessor contradicted testimony that the option had been given and accepted, the more convincing proofs indicate that plaintiff told the truth. His failure to produce the letter dated June 13, 1905, does not discredit his testimony, when his peculiarities and the conditions surrounding the negotiations are considered. It is undisputed that nearly five years before his lease expired he began negotiations for a longer occupancy, when he learned the lot was for sale. His lessor made him an offer. Why should he abandon his purpose before its consummation? He evidently thought a change in location would ruin his business. The terms of the option were more profitable to lessor than the terms of the lease. His negotiations were consistent with his business interests and purposes. The lot increased in value. Defendants offered \$3,600 for it. There was a temptation for lessor to avoid a sale to plaintiff. When the whole case is considered, her testimony is less convincing than that adduced on behalf of plaintiff. The finding is that the agreement of lessor to sell the lot to plaintiff was proved as pleaded. It is definite in its terms. Plaintiff tenders full performance on his part. Should the contract be enforced? It is argued that the offer or

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option is not enforceable, and that there was no consideration. The contract proved by the correspondence, when considered with all of the circumstances disclosed by the evidence, amounts to a modification of the lease, so as to permit lessee to buy the lot upon expiration of the stipulated term. Considered as an option, the agreement is enforceable. The quarterly rental and the promise to pay the purchase price are valid considerations for the modification. *Knerr v. Bradley*, 105 Pa. St. 190; *Bowman v. Wright*, 65 Neb. 661. Considered as an independent contract, the result is the same.

Defendants were not innocent purchasers. They knew before they accepted lessor's deed that plaintiff had been in possession of the lot for many years, and that in buildings which he had erected he was conducting a store on the premises. With such notice, they were bound to inquire about his rights. *McParland v. Peters*, 87 Neb. 829. His possession was notice to the world of his interests in the lot. *Draper v. Taylor*, 58 Neb. 787; *Best v. Zutavern*, 53 Neb. 604; *Scharman v. Scharman*, 38 Neb. 39; *Uhl v. May*, 5 Neb. 157. Defendants argue that the possession of plaintiff does not charge them with notice of his option, because it is not embodied in his recorded lease, and is not to be found in any other public record. This argument seems to have support in an isolated case *Hamilton v. Ingram*, 13 Tex. Civ. App. 604. The decisions generally, however, announce a contrary doctrine. The possession of a tenant is not only notice to the world of his rights as lessee, but is notice of all other interests of which inquiry would elicit knowledge. A purchaser of land, in possession of a lessee who was not asked about his interests in the demised premises, is bound by all of the equities enforceable by the lessee against the vendor. The notice imparted by a recorded lease for a five-year term does not put an end to inquiry as to the rights of a tenant who, for a long period of years, has been in possession of the demised premises, where he is conducting a store in buildings erected at his own expense. Cases announcing

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these principles of law and the reasons on which they are based are collected in an editorial note to *Garbutt & Donorum v. Mayo*, 13 L. R. A. n. s. 58, 98 (128 Ga. 269). The doctrine of the cases generally on this subject is in harmony with former rulings of this court. *Smith v. Gibson*, 25 Neb. 511; *Friedlander v. Ryder*, 30 Neb. 783; *Kahre v. Rundle*, 38 Neb. 315. Having accepted title with notice of the rights of plaintiff, defendants should be required to perform lessor's agreement to convey the lot to him.

The judgment of the district court is therefore reversed, with directions to enter a decree in favor of plaintiff for specific performance at the costs of defendants in both courts.

REVERSED.

MARGARET LAMB, APPELLEE, v. JOHN E. LAMB ET AL.,
APPELLANTS.

FILED NOVEMBER 12, 1913. No. 17,045.

1. **Appeal:** TRIAL DE NOVO. This being an action in equity, we are upon appeal required to try the issues *de novo*, without reference to the decision of the lower court. Upon the evidence in the record, which is outlined in the opinion, it is found that the decree is not supported by the evidence.
2. ———: **REVERSAL: DIRECTING DECREE.** When, in an action in equity, it is apparent upon appeal to this court that no further evidence can be furnished, this court will, upon reversal, direct such decree as the pleadings and evidence require.

APPEAL from the district court for Nance county:
GEORGE H. THOMAS, JUDGE. *Reversed with directions.*

John J. Sullivan, for appellants.

W. F. Critchfield, contra.

SEDGWICK, J.

The plaintiff, Margaret Lamb, began this action in the district court for Nance county to set aside and cancel a

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deed for a quarter section of land in that county which she had executed to defendant John E. Lamb. The court found the issues in favor of the plaintiff and entered a decree accordingly, and the defendants have appealed.

The plaintiff was the widow of Bartholomew Lamb, and owned several quarter sections of land and other real estate in her own right, and also certain pieces of land which had been devised to her by her husband. She had three sons and three daughters, and concluded to make a division of the lands among her sons and daughters and two grandchildren. For that purpose she employed and consulted with the defendant Shields to assist her in making the division, and this was done without the assistance and apparently without the knowledge of her children and grandchildren to whom she had decided to convey the property. Her purpose was to make an equal division among her children as far as practicable, and she appears to have given the matter careful consideration, and executed eight several deeds, one to each of her six children and one to each of the two grandchildren. She also procured a lease of each of the tracts of land to be prepared to be executed by each of the grantees, respectively, leasing the land to her during her natural life. These deeds and drafts of leases she placed in the hands of the defendant Shields, the deeds to be delivered to the grantees, respectively, and with instruction to procure the execution of the leases. Afterwards this defendant John E. Lamb executed the lease and delivered it to Mr. Shields for the plaintiff, and claimed that Mr. Shields had delivered the deed to him. It is alleged in the petition that the plaintiff had made a mistake in the description of the land in the deed to the defendant.

The case, as it is presented here, involves the determination of two questions of fact: Was the deed for the land in question delivered to the defendant John E. Lamb by authority of the plaintiff? And, if so, was there such a mistake of fact on the part of the plaintiff in the execution of the deed as to require a cancelation of the deed on that account?

The evidence upon the questions so presented must be considered in the light of the conditions and circumstances surrounding the whole transaction. The plaintiff was about 75 years of age, and was in feeble health, and appears to have had an equal regard for all of her children, and an earnest desire to make an equal division of the property among them. She desired, as she says, to avoid any trouble and dissension, and to that end she determined to make the division herself, with the help of Mr. Shields, in whom she had confidence, and who appears to have acted in an honorable and disinterested manner in the whole transaction. Her son, Bartholomew Lamb, was dissatisfied, and when his deed was presented to him, and he ascertained that the quarter section of land which is involved in this litigation had been deeded to the defendant John E. Lamb, he complained to his mother, and she then requested Mr. Shields to change the deed so that Bartholomew should get this land. In the division two deeds had been executed in favor of Bartholomew, one conveying a quarter section of land and the other another tract. He accepted the deed of the smaller tract, and took possession of the land and made some improvements thereon, but refused to accept the deed and execute the lease of the quarter section. After the trouble arose in regard to the deed of the land in dispute, Mr. Shields, under instructions from the plaintiff, and apparently with consent of all the parties, delivered other deeds to the respective parties for whom they were intended, which were placed on record, and the life leases, duly executed, were delivered accordingly. Mr. Shields testifies that he delivered the deed of the quarter section in this litigation to the defendant John E. Lamb, who then gave him \$1 as recording fee, and requested him to place the deed upon record, and also executed the lease and delivered it to Mr. Shields for the plaintiff, and that this was in accordance with his instructions from the plaintiff. The defendant John E. Lamb testifies to the delivery of the deed to him and execution of the lease by him, as stated by Mr. Shields.

The plaintiff testifies that she did not authorize Mr. Shields to deliver any of the deeds until all of the leases were executed and delivered to him. The plaintiff's testimony is not very satisfactory upon any of the matters to which it relates. She was evidently very much disturbed over the dissension which had arisen between her two sons, and was vacillating and uncertain in the position which she took in her testimony at different times, as well as in her interview with different parties interested. She consulted her attorney, and instituted these proceedings, apparently upon her own responsibility at the time, but she afterwards declared when under oath, as well as when she was not under oath, that she did not want this litigation to continue and that she wanted the action dismissed. She testified: "I was satisfied with it, but since it made the trouble I discovered there was a mistake." After the action was pending in this court she signed a formal motion to "reverse the judgment and dismiss the action," which was filed in the case in this court. An application was then filed in the probate court for Nance county to place her under guardianship, and that court appointed Mr. Shields as guardian of her person and property. Mr. Shields, as her guardian, then resisted her motion to reverse the decree of the trial court and dismiss the action in this court, and asked that this case be determined upon the evidence taken on the trial below. He filed a transcript of the record of his appointment as guardian, and affidavits were filed by both parties supporting and resisting the motion. It was agreed by the parties that the motion should be determined upon the final submission of the case. It is not necessary to determine the merits of that motion, because of the conclusion that we have reached upon the evidence in the record. The notary who took the acknowledgment of the deed testified that his understanding was that none of the deeds were to be delivered until all of the leases had been executed. He does not explain how he arrived at that understanding, and does not testify to any of the instructions that the plaintiff

gave Mr. Shields in regard to the delivery of the deeds by Mr. Shields. We think that the evidence shows, substantially without contradiction, that Mr. Shields was authorized to deliver the deed to the defendant upon his execution of the lease, and that he delivered the deed, as testified to by him.

The plaintiff testifies that, when Bartholomew called her attention to the matter, she discovered that she had made a mistake in the division. The evidence shows that, while she was making a division of the property and instructing Mr. Shields as to the preparation and execution of the deeds, they had an atlas or chart of the lands which she owned, and upon that she pointed out the lands which she wanted to deed to each of the parties. This particular quarter section in litigation lay just south and adjoining what was called the "home place." This was shown upon the atlas, and she at first designated this quarter section as one to be deeded to her son Bartholomew. Afterwards, upon consideration of the value of the lands to be conveyed to the respective parties, she discovered that, if this quarter was conveyed to Bartholomew, it would, under the division as she then proposed, give to Bartholomew much more in value than to any of the others, and her desire was to make an equal division. She therefore partially rearranged the matter, and instructed Mr. Shields to draw the deed of this particular quarter section to the defendant. It is clear that she made no mistake as to the particular piece of land that she deeded to the defendant, but the mistake that she accused herself of making was in not making the division so that it would be satisfactory to all of the beneficiaries of her bounty. She says that Bartholomew wanted this particular quarter section of land, and it appears that when she was with him and under his influence, or under the influence of those who were assisting him, she was convinced that she had made a mistake in not arranging it so that Bartholomew would be satisfied. This controversy is plainly between the two sons, Bartholomew and John, and it illustrates the wisdom of the

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plaintiff in making the division upon her own responsibility, and in avoiding the controversy that she feared would arise if she attempted to satisfy all of the parties before the division was made. It appears that the division as made gives to each of the parties substantially the same value. Bartholomew's contention is inconsistent. He appears to attempt to keep a part, at least, of the land conveyed to him, and at the same time inspire his mother to cancel the deed to his brother John so that that quarter may be conveyed to him also. The petition involves only the one quarter, and there is no attempt made to place the plaintiff in a position to make redivision of the land.

The decree is not supported by the evidence, and is reversed and the cause remanded, with instructions to enter a decree for the defendant, requiring a delivery of the deed in controversy to him.

REVERSED.

BARNES, LETTON and ROSE, JJ., not sitting.

**KIMBALL-MATHEWS COMPANY, APPELLEE, v. ADAH TUCKER,
APPELLANT.**

FILED NOVEMBER 12, 1913. No. 17,434.

Sales: ACTION FOR GOODS SOLD: EVIDENCE. This action was to recover the price of a bill of goods shipped by plaintiff to defendant pursuant to a written order. Defendant claimed that the goods were damaged, and immediately returned them to plaintiff, and telegraphed plaintiff to "cut the order in two," and to fill the order so changed with a different description of goods. The plaintiff received the returned goods, and held them until after the commencement of this action; also accepted the changed order, and prepared and shipped to defendant the goods accordingly. These goods were received and paid for by defendant. *Held*, That the original order was canceled by these transactions, and that defendant cannot be required to receive and pay for the goods originally ordered,

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Reversed and dismissed.*

Field, Ricketts & Ricketts, for appellant.

Burkett, Wilson & Brown, contra.

SEDGWICK, J.

The plaintiff recovered a judgment for \$86.25 in the district court for Lancaster county, and defendant has appealed.

Notwithstanding the smallness of the claim, we have had the assistance of two firms of eminent attorneys, and they have presented technical questions in the law of vendor and purchaser of personal property. Several witnesses testified upon the trial, but the determination of the fine points presented appears to depend upon the construction and effect of the written contract of sale and purchase and subsequent writings between the parties. The attorneys for the respective parties appear to have interpreted these writings differently, influenced possibly by the different interpretations thereof by the parties themselves. The cause was tried to the court without a jury, and we find ourselves constrained to take a different view of the meaning to be given to the contract from that taken by the trial court.

The defendant was proprietor of a photograph studio, and ordered a bill of "fancy buff-colored coverings" to be used in her trade. When the goods arrived she thought they were damaged, and telegraphed plaintiff: "Stock ruined in transit; will reship; cut order in two and fill with uncut paper; rush"—and immediately reshipped the goods to plaintiff. Plaintiff appears to have understood this telegram to be an additional order for goods, and prepared and shipped to defendant one-half of the amount originally ordered. Defendant understood the telegram, together with the return of the goods, damaged as she supposed, to be a rescission of the original order and the plac-

ing of a new order in place thereof. The point argued in the briefs is as to the rights of the respective parties under the original contract. The principal question discussed is as to the ownership of the property after it had been duly consigned to the defendant, and whether, if the goods were damaged in transit, it would be the loss of the plaintiff or of the defendant; whether the defendant would have the right to examine the goods and, if found damaged, to return them, without regard to whether the damage in transit was the fault of the plaintiff in packing and shipping them or solely the fault of the transportation company. We think it unnecessary to determine these interesting questions under the facts in this case.

It is clear that the defendant thought that the goods were damaged so that they were entirely unfit for her use, and she claimed the right to rescind the contract and make a new one, and if the plaintiff acknowledged that right, and accepted the new order in place of the original order, she would not be bound by the original contract. She immediately returned the goods furnished under the original contract, and the plaintiff executed her new order, so that it is only necessary to find the meaning of her telegram and the subsequent correspondence between them in relation thereto. The telegram told the plaintiff that the goods shipped were ruined, and that she would return them, and then directed the plaintiff to "cut the order in two and fill with uncut paper;" that is, in place of the original order, she now ordered one-half of the amount that she ordered before, and directed that it be filled with uncut paper, instead of as the original order was. The plaintiff did not answer by telegram, but immediately upon receipt of the telegram wrote the defendant a letter, in which the plaintiff said that it would "hardly be worth while" to return the goods, and stated that a claim for damages against the transportation company would have to be made by the defendant, because "when we take receipt for goods from the transportation company the goods become the property of the consignee." The plaintiff did not de-

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cline to receive the returned goods when they arrived, and appears to have held possession of them until after the commencement of this action in the court below. The order by telegram was filled and the goods shipped within five days after the telegram was sent. The defendant's proposition in the telegram clearly was that the plaintiff should accept a return of the damaged goods, and should prepare and ship to the defendant goods of a different description and one-half of the quantity in the original order. If the plaintiff had not been at fault and was entitled to insist upon the original contract, this proposed substitution of a different order might have been rejected and the original contract insisted upon. This the plaintiff did not do. It accepted and executed the substituted order, and cannot now insist upon the performance of the original contract.

If this is a correct construction of the contract and conduct of the parties, the judgment of the district court is wrong, and it is therefore reversed and the cause dismissed.

REVERSED AND DISMISSED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

J. ARTHUR TILLSON, ADMINISTRATOR, APPELLEE, V. CHESTER
HOLLOWAY, APPELLANT.

FILED NOVEMBER 12, 1913. No. 18,064.

1. **Appeal: TRIAL DE NOVO.** When in an action of ejectment the defendant alleges an equitable title to the land and right of possession thereunder, and all other defenses have been eliminated, the trial of the issue so presented is essentially the trial of an action in equity, and, upon appeal, this court will try the issue *de novo*, "without reference to the conclusion reached in the district court." Code, sec. 681a.
2. ———: ———: **CREDIBILITY OF WITNESSES.** When several witnesses who disagree as to an important fact have testified in the pres-

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ence of the trial judge, and the court has had an opportunity to observe their manner and the many circumstances that tend to give confidence or arouse distrust as to the reliability of their testimony, this court will take into consideration the estimate of the trial court as to the reliability of the evidence.

3. EVIDENCE: LETTERS. A letter of the then owner of the legal title, written 26 years ago in pencil upon coarse brown paper, in which it appears that some words have been retraced and some figures rewritten, under the circumstances mentioned in the opinion, is considered of little, if any, value as evidence.
4. ———: EQUITABLE TITLE TO LAND. Evidence to establish an equitable title to land, as against the legal title, must be clear and satisfactory. The evidence in this case is examined and sufficiently quoted in the opinion to show its general character, and held insufficient to establish an equitable title.
5. EJECTMENT: EQUITY. When the owner of real estate is indebted to his son for money loaned, and puts the son in possession of the real estate upon the mutual understanding and agreement that the son shall have the possession and use of the land until settlement between them, and after many years the father dies without having made such settlement, the devisees and heirs of the father will not be allowed in equity to recover possession of the land without accounting for and payment of the amount due the son.
6. Limitation of Actions. In such case the statutes of limitation have no application either to the right of the devisees and heirs to possession of the land or to the claim of the son to reimbursement for the money loaned to his father.

APPEAL from the district court for Buffalo county:
BRUNO O. HOSTETLER, JUDGE. *Reversed with directions.*

H. M. Sinclair and W. D. Oldham, for appellant.

Fred A. Nye and J. Arthur Tillson, contra.

SEDGWICK, J.

This action was begun as an action in ejectment by the administrator of the estate of Achsah Holloway, deceased, to recover possession of 320 acres of land in Buffalo county. The defendant answered, among other things, alleging an equitable right to the land, and upon his former appeal from an adverse judgment this court held

(90 Neb. 481) that the trial court had failed to determine the issue presented by this equitable defense and the case was remanded for that purpose. It was held that all other issues pleaded in the case had been correctly determined in favor of the plaintiff therein. Upon the second trial in the district court for Buffalo county much of the evidence upon the former trial was again introduced by the parties, with other evidence, and the court found the issues in favor of the plaintiff and rendered a judgment for the possession of the land, from which the defendant has again appealed.

The legal title to the land was in the name of Ira Holloway, the defendant's father, and upon his death the title passed by his will to his wife, Achsah Holloway, the defendant's mother. The defendant alleged that his father had sold the land to him in consideration of money which he had loaned to his father. The details of his answer are set out in the former opinion and it is unnecessary to repeat them here. About 30 years ago the defendant's father, who was a resident of Ohio, and shortly after removed to Michigan where he resided until the time of his death, purchased the land in question, and also procured a timber claim upon an adjoining quarter section. Afterwards the timber claim was transferred to the defendant, and he has resided thereon for nearly 30 years. It appears from the evidence that the defendant's father was indebted to several of his children in a considerable amount. His indebtedness to the defendant in the sum of at least \$1,500 appears to be established by the preponderance of the evidence. There is some evidence tending to show that his father owed the defendant an additional amount, possibly \$3,000 more. The defendant took possession of the land in dispute in 1884 or 1885 and has ever since been in possession thereof. Soon after taking possession of the land he fenced the same and has since made some other improvements thereon. He never was called upon for any rent until after the death of his mother in 1907. The defendant was not allowed to testify to any transactions or

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oral agreements between himself and his father and mother, being incompetent under section 329 of the code. There are nine children and heirs of his father and mother, and there appears to have been an unfortunate disagreement among them. One of his brothers testified as to the indebtedness of his father to the defendant, and Mrs. Hambrook, one of his sisters who resided in Michigan, testified that she had heard her father, before the defendant came to Nebraska, say "that Chester was to have the land." She could not state the language used by her father, nor any other part of the conversation. She had never seen the land and did not know how much land her father or her brother had in Nebraska. She did not make it clear whether her father referred to some or all of his land in Nebraska, or to the timber claim which the defendant did have, or to the land in dispute. Another sister, Mrs. Gribben, who resides in Iowa, testified that she had heard her mother say that the defendant "has got no heirs and we will get the land anyway." They were talking about the defendant holding the land, and it does not appear that her mother's statement had anything to do with the defendant's right to the land. She also testified that she had heard her brother, C. C. Holloway, say that the land was the defendant's, and had heard the defendant say the same thing. C. C. Holloway was a witness upon the trial, and of course neither his statement nor under oath, nor the statements of defendant himself, could be evidence in this case. Samuel King testified that he had heard defendant say that the land "belonged to his mother, and that it belonged to his father, and that it belonged to him," and, when asked what the defendant said about its belonging to him, he answered: "That is about all I ever heard him say; its belonging to them."

Defendant's exhibit 2 purports to be a long letter written by Ira Holloway in 1886. It is on coarse brown paper and written in pencil. It covers a variety of subjects, and contains a sentence which defendant claims should be read: "I rec'd a letter from Chester last week that he had

an offer of 4.00 per acre for 480 of his ranch in cash. I told him to do as he thot best. He may sell." The plaintiff insists that the paper is wholly incompetent; that it shows on its face that it has been changed in material parts. Some of the words and figures of the above quotation have been retraced, and there is some appearance of erasure and substitution. The trial court overruled the objection to the admission of the paper in evidence, and said that he would consider it "for what in his judgment he considered it worth." Such evidence is not very satisfactory, and even if it is considered genuine, and read as the defendant contends, it does not so strengthen defendant's evidence as to overcome the evidence of plaintiff and require a judgment in the defendant's favor. The defendant was then more than 40 years of age, and that he should obtain his father's consent to sell the land is significant. As a ranch it was used only by the son, and might for that reason be spoken of as "his ranch." In the clause "480 of his ranch," the figures and parts of words appear to have been rewritten. The whole tract occupied by him was exactly 480 acres, so that the words "480 of" as they appear in this paper have no especial force, but with the words "his ranch" they have an awkward appearance. The paper is of very little value as evidence.

There is, perhaps, other evidence in the record that might be considered as indicating that the defendant is the owner of this land, but it is not of sufficient importance to make it advisable to extend this opinion by reciting it here.

The evidence produced by the plaintiff is amply sufficient to rebut the defendant's evidence, and to establish that Ira Holloway never agreed to transfer the legal title to the land to the defendant. It is not necessary to recite and review the great volume of evidence. We will call attention to a few items as illustrating its general character: One of the appraisers of the estate testified that when he and his associates were making an inventory of the property of Achsah Holloway, deceased, he called upon the de-

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fendant and asked him for a statement of her property, and, among other things, he stated this land in dispute as the property of Achsah Holloway. This witness appears to be interested in the estate, and his testimony is denied by the defendant.

Under our present statute, we are required to try this case *de novo*, without reference to the decision of the trial court. When several witnesses who disagree as to an important fact have testified in the presence of the trial judge, and the court has had an opportunity to observe their manner and the many circumstances that tend to give confidence or arouse distrust as to the reliability of their testimony, this court will take into consideration the estimate of the trial court as to the reliability of the evidence.

On the evening after the funeral of Achsah Holloway, several of the heirs being present, and the defendant with them, some of the papers of the deceased were examined, and several of the persons present testified upon the trial that the defendant was asked to state the property of the deceased, within his knowledge, which he did, and among other things stated this land in dispute and the probable value thereof. This testimony is denied by the defendant, and by his two sisters, above named, who were also present. The evidence of some of these witnesses was taken by deposition, but some of them testified to this conversation in open court, and the trial judge appears to have believed their testimony.

During all of these years the taxes on this land have been paid, principally, if not entirely, by the parties who held the legal title, or by some one in their behalf. The defendant testified that for one or two years, 25 or 30 years ago, he paid the taxes. He took receipts in his father's name, but paid them, as he says, with his own money. There is other evidence in the record, some of it strongly tending to show that this land was regarded by all, including the defendant, as the land of Ira Holloway, during his lifetime, and after his death as the land of

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Achsah Holloway, and there is also some evidence of the same nature, but of less force and importance. The evidence fails to show that Ira Holloway sold this land to the defendant, or agreed that the defendant should have the land as his own, or that the defendant has held the land adversely so as to acquire title by adverse possession. We are satisfied, however, that this evidence does prove that Ira Holloway put the defendant into possession of the land and allowed him to retain possession because of his indebtedness to the defendant, and because of the use which he had of the defendant's money; that both parties intended and expected that a settlement would be made between them, and the defendant held possession of the land under an implied agreement that he might do so until his money was returned to him. Under such circumstances, the statutes of limitation would not run either against Ira Holloway's right to the land nor the defendant's claim for the money which his father owed him. The defendant ought not now to be dispossessed of the land without a settlement and adjustment of the amount due him from the estate. The evidence is not sufficient to enable us to determine with certainty the amount due defendant.

The judgment is therefore reversed and the cause remanded, with instructions to take further evidence, if necessary, and find the amount due defendant with simple interest at 7 per cent. per annum. Against this, offset the value of the use of the land, and enter a decree in favor of plaintiff for possession of the land upon payment of balance due defendant as so found. Unless the same is paid within 90 days from the entry of the decree, the land shall be sold, and costs and defendant's claim paid out of the proceeds, and balance to the plaintiff.

REVERSED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

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**JAMES WHELAN, APPELLEE, v. CHARLES DANIELS, APPELLEE;
CITY GARBAGE COMPANY, APPELLANT.**

FILED NOVEMBER 12, 1913. No. 17,345.

1. **Municipal Corporations: ORDINANCES: VALIDITY: DEAD ANIMALS.**
The city of Omaha by an ordinance, in effect, declared that the carcasses of all dead animals found within the city, which were not slain for food, should at once become the property of the public contractor, whose name was contained in the ordinance; such ordinance is void, so far as it attempts to take private property without due process of law.
2. ———: ———: **DISPOSITION OF DEAD ANIMALS.** The owner should be permitted to remove such animals or to cause the same to be removed within a reasonable time fixed by such municipality, and be allowed to receive the value thereof, or to put the same to a beneficial use.

APPEAL from the district court for Douglas county:
HOWARD KENNEDY, JUDGE. Affirmed.

Will H. Thompson, for appellant.

I. J. Dunn and J. J. O'Connor, contra.

John A. Rine, W. C. Lambert and Clinton Brome, amici curiæ.

HAMER, J.

The defendant, the City Garbage Company, appeals from a judgment for costs in the district court for Douglas county. In that court there was a finding in favor of the plaintiff to the effect that at the commencement of the suit the plaintiff was entitled to an injunction against the defendants as prayed for in the petition; but, the contract upon which the suit was brought having expired, the injunction was denied for that reason only. Judgment was entered against the defendant, the City Garbage Company, for costs.

The plaintiff alleged that he was a citizen and resident

of the city of Omaha, and that on the 10th day of March, 1908, he entered into an ordinance contract with said city to remove and make use of all dead animals, not slain for human food, necessary to be removed during the period of three years on and after May 4, 1907; that under the contract the plaintiff was to remove *all dead animals wherever found in the city of Omaha*, whether on the streets, alleys or public grounds of the city, or on any private premises within the city, free of charge to the city, and free of charge to the residents thereof, said animals to be removed at once when notified by any one, and that a failure to remove any such dead animals, when so notified by the health office, within 12 hours after such notice, would subject the plaintiff to forfeit to the city \$5, and \$5 additional for a failure so to do for every 12 hours thereafter; that it was further agreed that the carcass of any dead animals so removed should not be allowed to be exposed to the air, or decay on any lot within a radius of three miles of the city limits, and that such dead animals should be disposed of in such manner that there would be no danger of producing a nuisance or unsanitary condition; that the plaintiff supplied himself with wagons and teams and all necessary equipment to do the work, and arranged to dispose of all dead animals so hauled as required by the terms of the contract, and that he incurred great expense in getting ready to carry out the terms of such contract; that the city of Omaha contains about 125,000 inhabitants and covers a large territory, and from day to day large numbers of dead horses, cows, cats, dogs, etc., are to be found upon the streets and on private premises within the city; that the prompt and efficient removal of the same from the city is absolutely necessary to the health and comfort of the inhabitants; that, unless the plaintiff is protected from the interference of the defendants and their associates, he cannot make an income *sufficient from said business for the same to become profitable*, and that he will suffer great loss and financial injury; that the plaintiff's right to remove *all such dead animals is exclusive*; that

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said contract is for the benefit of the public; that the defendants and their servants, ever since the execution of such contract between the city of Omaha and the plaintiff, continuously interfere with the business of the plaintiff, and remove said animals and appropriate them to their own use, and deprive the *plaintiff of property in the same*; that said defendants are doing said work contrary to the provisions of the said ordinance of the city of Omaha; that they claim that plaintiff's contract with the city is invalid, and that the ordinance relating to the removal of dead animals is invalid; that the plaintiff is greatly damaged thereby; that the ordinance provides that no person who *has not a contract so to do* shall haul dead animals within the city of Omaha; that said ordinance is not enforced; that the police judge of said city has decided that the ordinance is void, and declines to permit prosecutions against persons engaged in violating the said ordinance. The prayer is that the defendants, their servants, and agents may be enjoined during the life of the plaintiff's contract from carrying on said business on said premises within the limits of the city of Omaha, and from hauling or removing or disposing of dead animals within said city, or in any way interfering with the plaintiff in the discharge and execution of his said contract.

The agreement entered into was by an ordinance whereby the plaintiff for a term of three years received from the city of Omaha the sole and exclusive right to haul and remove all dead animals (not slain for human food) wherever found in said city.

The City Garbage Company answered that it was engaged in the removal and disposal of the carcasses of dead animals since the 10th of May, 1908, and for some time prior thereto, and that the said carcasses were the property of the defendant, the City Garbage Company; that the carcasses were removed within 10 to 20 hours from the death of the animals and before they became a nuisance or detrimental to public health, and that they were removed in a sanitary way; that, if the defendant had

failed to remove the carcasses, the same would in many instances have become a nuisance and a menace to the public health because of the fact that no one else would have removed the same; that said carcasses have been allowed to remain for a much longer period than 12 hours before being removed, sometimes remaining on the premises where they died as long as two or three days.

It is seemingly claimed by the plaintiff that he should recover a judgment and be held to be entitled to the ownership of all the dead animals that die in the city, and to have the right to remove the same in order to be able to maintain himself in the business of hauling dead animals for the city. Inferentially this is a contention that the property of one man may be taken for the benefit of another, that is, that the fat dead horse or cow of one man may be taken by the contractor so as to enable him to remove the lean, mangy, dead horse of another man, and the lean, hidebound, tallowless cow of still another, as also dead cats and dead dogs having no value. It would seem to be contended that the business of the plaintiff as a contractor with the city may not be carried on because of the danger of his financial failure and the failure of the business, unless he is given the *exclusive* right to take *all* the dead animals which die in the city and to become the owner of the same. If A should lose by death a fat, well-conditioned Galloway or Polled-Angus cow, her hide when removed might have a value of \$10 to \$20, possibly more. The body of the animal alone might be worth nearly or quite as much. The theory of the plaintiff is that under the ordinance he should be held to have A's cow, including the valuable robe which might be made from her hide, and without any compensation to A, and so as to enable him to remove B's dead cow that is lean, hidebound, tallowless; and of little or no value. It must be conceded that, if the owner of the dead animal does not remove the body within a reasonable time, the safety of the public being endangered by the presence of the same, the city has a right to direct that the body shall

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be removed; but to take the property of A so as to enable the plaintiff to haul away the dead bodies of animals belonging to B, C and D, without expense to them or to the city, is not due process of law as to A, and is in no sense justifiable. The following cases support our views: *Knauer v. City of Louisville*, 20 Ky. Law Rep. 193, 41 L. R. A. 219; *State v. Morris*, 47 La. Ann. 1660; *Yates v. Milwaukee*, 10 Wall. (U. S.) 497; *Underwood v. Green*, 42 N. Y. 140; *Schoen Bros. v. City of Atlanta*, 97 Ga. 697; *Campbell v. District of Columbia*, 19 App. D. C. 131; *River Rendering Co. v. Behr*, 77 Mo. 91; *City of Richmond v. Caruthers*, 103 Va. 775; *Freund, Police Power*, sec. 522; *Her v. Ross*, 64 Neb. 710.

An examination of the authorities cited shows, as it was specifically held in *Knauer v. City of Louisville*, *supra*, that the municipality cannot, under the claim that the carcass of the dead animal is a menace to the public health, authorize its contractor to take possession of it and to convert it to his own use, and, if he does so, it is confiscation. It was held in the same case that the owner's rights did not cease at the death of the animal, but that the municipality might prescribe a time in which the owners should be permitted to remove the dead carcasses or cause them to be removed. In *State v. Morris*, *supra*, it was said: "If the property is not a nuisance, the owner should not be prevented from obtaining its value and should not be denied the right to make any disposition of it (however innocent and useful)." The court also said: "It is not possible, under police regulation, to take property from one man and give it to another. The city might, as a sanitary measure, after having given the owner an opportunity to dispose of his dead animals, authorize a contractor to cart them away and appropriate them to his own use." In *Yates v. Milwaukee*, *supra*, it was held that it could never be necessary to take from one man his property and give it to another until the property was in such condition that it was about to become a nuisance, and that an opportunity should be given the

owner to make such disposition of his property as would prevent the apprehended danger. In *Underwood v. Green, supra*, it was held that a dead hog was not *per se* a nuisance; that it was not necessarily dangerous to the public health; and that the owner might put it to a useful and innocent purpose, and that the municipal authorities would not arbitrarily deprive him of his property by giving it to another. In *Schoen Bros. v. City of Atlanta, supra*, it was held: "That where an animal dies or is found dead within the corporate limits, it shall not be allowed to remain there beyond a specified reasonable time, and that the owner shall within that time remove it or cause it to be removed beyond such limits, and to a specified reasonable distance, and that, unless he does so, the carcass shall be taken charge of by the agent of the corporation and dealt with as a nuisance *per se*." But in that case the particular ordinance under which Schoen Brothers were tried was declared unconstitutional and void. In *Campbell v. District of Columbia, supra*, it was held that the refusal by the municipal authorities of a permit to remove the carcass in a manner conformable to the police regulations governing the transportation of dead animals through the city was unjustifiable and an attempt to deprive the owner of his right of property in the carcass. In *River Rendering Co. v. Behr, supra*, it was held: "A city ordinance is void which undertakes to confer upon one person the right to remove and convert to his own use the carcasses of all dead animals, not slain for food, found within the limits of the city, to the exclusion of the right of the owners of the same to remove and use them before they became a nuisance." In *City of Richmond v. Caruthers, supra*, it was held that an ordinance like the one in question was in conflict with the fourteenth amendment to the constitution of the United States forbidding that any person shall be deprived of his property without due process of law.

It is clearly within the police power of the state by ordinance of its towns and cities, and within the limits

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prescribed by the legislature, under the constitution, to protect the public health. In the exercise of such power and acting in good faith, a city may provide for the removal of dead animals if the owner neglects to do so within a reasonable time to be prescribed by the ordinance, and its right to do so may not be seriously questioned. The owner of a dead animal, when it dies upon the owner's premises, may have a reasonable time to remove the same, such time to be prescribed by the ordinance. The owner has a property interest in the dead animal which he should be allowed to protect, and if the ordinance fails to give such opportunity it is in that respect unconstitutional because it takes private property without due process of law.

The city authorities may, without doubt, under the police power, regulate and control the removal of dead animals, and, to that end, may provide for and appoint a suitable person, under proper restrictions and regulations, to manage and control such removal, and make it his exclusive duty so to do. *Smiley v. MacDonald*, 42 Neb. 5. *Iler v. Ross*, 64 Neb. 710, must not be construed to overrule the former case. The officers of the city must be allowed a large discretion in determining when and how such garbage must be disposed of, but the rights of property in the individual must not be unnecessarily violated. The defendant, the City Garbage Company, a corporation organized for that purpose, assumed the right to engage in a general garbage removal business in the city of Omaha, and there is no doubt of the authority of the city, in the exercise of the police power, to prevent the defendant from interfering with the city's duly authorized official in the discharge of his duty. The plaintiff's right to an injunction to protect his property interest in the garbage to be removed is not so clear, but it is not necessary to further investigate that question in this case, since his contract had expired before the trial of the case in the district court, and that court was not clearly wrong in refusing him an injunction for that reason.

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The writer does not think that the plaintiff, at the time he commenced his action, was entitled to any relief as against the defendant, the City Garbage Company. But the majority think that he was. In such case the apportionment of costs is within the sound discretion of a court of equity, and it does not appear that there was an abuse of discretion in that regard by the trial court.

The decree of the district court is

AFFIRMED.

ROSE, J., dissents.

**CHARLES R. WHITLOW, APPELLEE, V. MISSOURI PACIFIC
RAILWAY COMPANY, APPELLANT.**

FILED NOVEMBER 12, 1913. No. 17,384.

1. Railroads: ACTION FOR DAMAGES: NEGLIGENCE: QUESTION FOR JURY.

In an action for damages against a railroad company because of the injury to property occasioned by its alleged negligence, it is for the jury to say, under proper instructions from the court, whether the acts proved constitute negligence for which the company is liable.

2. Negligence: QUESTIONS FOR COURT AND JURY. While the court may say what act or omission of a party is evidence of negligence, it is for the jury to say what conclusion such evidence warrants.
Omaha Street R. Co. v. Craig, 39 Neb. 601.

APPEAL from the district court for Nemaha county:
LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

Edgar M. Morsman, Jr., and Will H. Thompson, for appellant.

Lambert & McCarty, contra.

HAMER, J.

This case was brought in the district court for Nemaha county against the defendant, the Missouri Pacific Railway Company, to recover damages for the alleged de-

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struction of a wagon, water-tank, pump and harness. The articles mentioned were destroyed at a public crossing, where there was a collision between the wagon and the water-tank of the plaintiff and a train of cars belonging to the defendant. The plaintiff had a verdict and judgment, from the latter of which the defendant prosecutes an appeal.

It is undisputed that there was a collision, and the question is against whom should the blame attach.

The petition alleged that the bell on the locomotive was not rung nor the whistle blown at a distance of 80 rods or more from the railroad crossing where the collision occurred; that the team and wagon was in charge of an employee of the plaintiff, who was exercising due care and prudence in the handling of the team, and that the destruction of the property by the locomotive was without any fault or neglect of the plaintiff or his agent or employee, and that it was wholly caused by the negligence and carelessness of the defendant. The property destroyed was being used in the hauling of water for the purpose of supplying an engine that furnished power to run a threshing machine in the neighborhood of the crossing. The answer of the defendant admitted that it was a corporation owning the railroad which extended between the city of Auburn and the city of Omaha, in the state of Nebraska; also admitted that the plaintiff was the owner and in possession of the articles destroyed; also admitted that there was a collision between the wagon and water-tank of the plaintiff and the train of cars of the defendant; but denied that the collision was due to any negligent act or omission on the part of the defendant or its agents or servants; also alleged that, if the plaintiff received any injury, the same was caused by the negligence of the plaintiff and his employee who had the custody of the property; that the plaintiff placed the custody of the property in the hands of a young and inexperienced boy, who was driving the wagon at the time of the collision, and that this boy negligently and carelessly drove upon

and over a public crossing without using due care in looking out for the approach of the defendant's train, and after hearing and seeing the approach of the train.

The driver testified on behalf of the plaintiff that he was 16 years old; that the team consisted of a mule and a horse; that a holdback strap had been broken; that the wagon pushed down on the horse, which had no holdback, and that the mule had to do all the holding back that was done. The boy was hauling water for a steam thresher. He got a load of water and started back to the thresher. He had to cross the railroad track. He crossed it on a public road running east and west, while the railroad track ran north and south. He was driving down a hill near the crossing as the train approached. The wagon came down the hill onto the crossing where the collision happened, probably accelerated by the condition of the broken holdback strap. The witness testified that the train was going north, and that it was about 50 feet from him when he first saw it; that the *engine did not whistle until the train hit the wagon, and that the bell did not ring*; that, as he was crossing the track, he looked up and saw the train on the track just a short distance from him, and that he jumped off the wagon, and, just as he jumped, the train hit the tank and broke it all to pieces. Fortunately the team was not injured.

The last paragraph of instruction No. 5, given at the request of the plaintiff, and quoted in defendant's brief, is as follows: "And if from the evidence you believe that the injury alleged by the plaintiff did occur, and that the defendant railroad company caused the same, as alleged in plaintiff's petition, and you further find that in the causing of said accident the defendant was guilty of negligence under the rules laid down to you in the instructions given, you shall find for the plaintiff." When this part of the instruction is read in connection with the part not quoted, the instruction, as a whole, is clearly not erroneous. In the part not quoted the jury were told that, in determining whether the plaintiff was guilty of con-

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tributory negligence, they might take into consideration whether he looked and listened for the train the distance from the track at which he could first see it, the obstructions to his view, and all the circumstances and conditions shown then to have existed, and if from all the evidence they found that the person in charge of the team, wagon and other property exercised the care and caution in attempting to cross the railroad track that a prudent and careful man would have exercised under such circumstances, then that the plaintiff was not guilty of contributory negligence. The foregoing, in substance, was introductory to the matter quoted and qualifies the same.

At the plaintiff's request the court gave to the jury instruction No. 1, as follows: "You are instructed that section 104 of chapter 16 of the statutes of Nebraska, which applies to this section, is as follows: 'A bell of at least thirty pounds weight or a steam whistle shall be placed upon each locomotive engine, and shall be rung or whistled at the distance of at least 80 rods from the place where the said railroad shall cross any other road or street, and be kept ringing or whistling until it shall have crossed said road or street, under a penalty of fifty dollars for every neglect, to be paid by the corporation owning the railroad, one-half thereof to go to the informer, and the other half to this state, and also be liable for all damages which shall be sustained by any person by reason of such neglect.' Now, in this case, if you find from the evidence that, as the engine of the defendant railroad company approached the public crossing where the accident happened, the whistle was not sounded nor the bell rung, as required by the statute, and that the accident complained of was caused by the failure so to ring the bell or blow the whistle, and without any fault or negligence on the part of the plaintiff or his employee or servant who was at that time in charge of the property injured, then you shall find for the plaintiff."

It was evidently the intention of the trial court to submit to the jury the question of the defendant's alleged

negligence in failing to ring the bell or to blow the whistle as the train approached the crossing. It is contended by the appellant that, as the trial court told the jury to find the defendant railroad company liable if the bell was not rung or the whistle was not blown at the distance of at least 80 rods from the crossing, then that the instruction relating thereto was, in effect, to say to the jury that they should exclude from their consideration any and all other facts relating to the case, and that they should rest their verdict solely on the failure to ring the bell or to blow the whistle; but this contention loses sight of the fact that instruction No. 1, quoted last above, contains the further provision that, if the accident complained of was caused by the failure so to ring the bell or blow the whistle, and *without any fault or negligence on the part of the plaintiff or his employee or servant*, then there could be a finding for the plaintiff. That the broken hold-back strap on the horse which prevented him from holding back the wagon, and which compelled the mule to do all the holding back that was done, may have accelerated the speed of the wagon down the hill as it approached the crossing, and may have thereby contributed to the accident, is possible, and perhaps probable; but whether there was negligence of a contributory character attaching to the plaintiff because of this fact was a matter peculiarly within the province of the jury, as also whether the bell was rung or the whistle blown, and, if not, whether the failure to do so on the part of the defendant caused the injury.

Instruction No. 1, complained of, was apparently copied from the instruction given on behalf of the plaintiff in *Union P. R. Co. v. Elliott*, 54 Neb. 299. That instruction was not given in a case on all fours with the instant case. In that case one Elliott was an employee of the railway company, and while standing between two tracks in a switch-yard he was struck by a passing engine. He had a verdict and judgment. Of the instruction given this court said: "But, if the instruction was erroneous, we do not think it prejudiced the railway company, as, after all, the

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effect of the instruction was to tell the jury that if Elliott's injury, without negligence on his part, was caused by the failure of a bell to be rung or a whistle to be blown on the switch engine, then the railway company was liable. The quoting of the statute by the court in the instruction added nothing whatever to it, as, irrespective of a statute, the starting or running of a switch engine in a switch-yard filled with a network of tracks, upon which cars and engines are constantly moving and in which yardmen are constantly at work, without the ringing of a bell or the blowing of a whistle, is evidence of negligence."

While it was unnecessary to inform the jurors that a penalty of \$50 might be inflicted upon the corporation owning the railroad for every neglect to ring the bell or blow the whistle, it was quite proper to tell them that the railroad company was liable for all damages sustained by the plaintiff in this case by reason of such neglect, provided they so found. If the instruction may have been erroneous because of the statement touching the \$50 penalty which might be inflicted for neglect to ring the bell or blow the whistle, it does not therefore follow that the error was so far prejudicial that the verdict was induced by it, and should, because of that fact, be set aside. The trial court quoted the statute probably as the easiest way of telling the jury the liability which the defendant incurred if it was negligent; and, while there was no necessity to tell them of the punishment which might be inflicted in *another* and *different* proceeding, if the company should be prosecuted and found guilty, it does not follow that the verdict was brought about by the statement made. It was for the jury to find the facts under proper instructions. The evidence sustains the verdict, and, in any event, the defendant does not make the contention that it fails to do so. It complains only of the instructions. We are unable to find any prejudicial error therein.

The judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

G. A. CRANCER COMPANY, APPELLANT, v. WILLIAM COMBS,
APPELLEE.*

FILED DECEMBER 4, 1913. No. 17,442.

1. **Replevin: NATURE OF ACTION.** In an action of replevin the wrongful detention of the property in dispute and plaintiff's right to possession constitute the gist of the action.
2. **Appeal: THEORY OF CASE.** On appeal to the supreme court the cause will be treated and disposed of upon the theories presented by the parties upon the trial, if a liberal construction of the pleadings as construed by them will permit the same to be done.
3. **Replevin: DEMAND: INSTRUCTIONS.** Where, in an action in replevin, the evidence showed conclusively that a sufficient demand for the possession of the property had been made before the commencement of the suit, an instruction by the court, whether right or wrong, that proof of a demand was necessary in order to permit the plaintiff to recover could work no prejudice to the plaintiff.

APPEAL from the district court for Butler county:
GEORGE F. CORCORAN, JUDGE. *Affirmed.*

C. M. Skiles and F. H. Mizera, for appellant.

L. S. Hastings, contra.

REESE, C. J.

This is an action in replevin, instituted in the county court of Butler county, by plaintiff against the defendant for the possession of an upright Brewster piano, which was alleged to have been wrongfully detained by defendant, plaintiff claiming the ownership and the right to the possession thereof. Defendant answered, admitting that plaintiff was the owner of the piano at the time of the commencement of the suit and was entitled to the possession thereof, but alleging that no demand had been made for the property prior to the commencement of the suit. In addition to a general denial, he pleaded a "counterclaim set-off," alleging, in substance, that an agent of plaintiff took the piano to the home of defendant, stating

* Reversed. See opinion, Vol. 95, p. —.

that he had sold the instrument to a neighbor of defendant, who was not quite ready to receive it, and asked permission to leave it at defendant's residence for one or two weeks, and by the consent of defendant's wife placed it in defendant's home; that after the expiration of said time defendant notified plaintiff's agent to remove it or storage would be charged therefor; that plaintiff paid no attention to said demand, but left the property in defendant's house for some eight months, and that a reasonable charge for such storage would be the sum of \$45, for which judgment was demanded with costs. A reply consisting of a general denial was filed. A jury trial was had, which resulted in a verdict finding that at the time of the commencement of the action the defendant was not wrongfully detaining the possession of the property, and assessing his recovery "on his counterclaim" at the sum of \$25. Plaintiff moved for a new trial, upon the ground that the verdict was excessive; that it was not sustained by sufficient evidence; was contrary to law; for errors occurring at the trial; and that the court erred in giving certain specified instructions to the jury. The motion for new trial was overruled, and judgment rendered in favor of defendant for the sum of \$25 and costs of suit. Plaintiff appeals.

It is to be regretted that more careful attention has not been given to the provisions of the code governing suits in replevin, and to the rules of pleading in such actions as established by a long series of decisions by this court. It is difficult to see how the admission that plaintiff was the owner and entitled to the possession of the property in dispute at the time of the commencement of the action can be well harmonized with the general denial pleaded in the same answer. The gist of the action is the right to the possession of the property. If plaintiff was the owner and entitled to the possession thereof, as admitted in the answer, it was entitled to judgment without further proof. If defendant had a lien on the piano for the storage, plaintiff was not entitled to possession, and a general

denial was the only pleading necessary, for by it every averment of the petition was denied, including that of the right of possession. *Jenkins v. Mitchell*, 40 Neb. 664; *Davis v. Culver*, 58 Neb. 265. If defendant were held strictly to his pleading, it is doubtful if there was any issue to be tried. However, as all parties seemed to be satisfied with the presentation of issues, and tried the case upon defendant's counterclaim or set-off without objections and as if no admission had been made in the answer, we will be equally liberal and determine the case upon the record brought to this court.

The evidence is conclusive that plaintiff has at all times been the owner of the property. The only question is as to defendant's lien for storage and care. There was evidence tending to prove that at or about the expiration of the two weeks defendant notified plaintiff that the piano would have to be removed or storage would be charged. It was not removed for many months thereafter. While it may be that the jury were somewhat liberal in their verdict, we cannot say it was so excessive as to call for a reversal of the judgment or require a remittitur.

The court instructed the jury, in substance, that before plaintiff could recover he must prove a demand for the property before the commencement of the action. This instruction was excepted to, and is now assigned for error. As there was ample proof of demand, the instruction could work no prejudice, even if wrong. It was in accord with the theory upon which plaintiff tried the case. Plaintiff cannot now complain.

Finding no error requiring a reversal of the judgment, it is

AFFIRMED.

LEITON, FAWCETT and HAMER, JJ., not sitting.

Ford v. Thompson.

W. N. FORD ET AL., APPELLANTS, V. PERRY E. THOMPSON,
APPELLEE.

FILED DECEMBER 4, 1913. No. 18,143.

Intoxicating Liquors: LICENSES: POWER OF BOARD. Where the electors of a city or village at a legal election held therein under the provisions of section 1, ch. 75, laws 1911 (Comp. St. 1911, ch. 50, sec. 25) have voted upon the question of "license" or "no license" for the sale of intoxicating liquors, and a majority of the votes cast are in favor of "no license," the city or village board have no authority to issue a license during the then current year.

APPEAL from the district court for Sheridan county:
WILLIAM H. WESTOVER, JUDGE. *Reversed with directions.*

A. C. Plantz and M. F. Harrington, for appellants.

Allen G. Fisher, William P. Rooney and R. L. Wilhite,
contra.

REESE, C. J.

An application was made to the chairman and board of trustees of the village of Rushville for a license authorizing Perry E. Thompson to sell intoxicating liquors in said village. The petition was signed by the requisite number of resident freeholders of the village, and notice of the time for hearing was duly given. A remonstrance was presented, in which it was alleged that prior to the first Tuesday in April, 1913, a petition signed by 54 resident freeholders of the village had been presented to the clerk asking that the question of whether license should be issued for the sale of liquors therein be submitted to the legal voters at said election, that the question was duly submitted, and that at said election a majority of the electors voted against the issuance of such license. At the hearing before the village board it was stipulated that the election was duly held, and that the result thereof was as alleged and fully set out in the remonstrance. The

applicant filed a motion to strike from the remonstrance the averments relative to said election, upon the grounds: "(1) That said pretended remonstrance does not state facts sufficient to constitute a remonstrance; (2) that said remonstrance does not state facts sufficient to constitute a legal objection to the issuance of a license; (3) for the reason that the facts stated in the pretended remonstrance are not sufficient to constitute a repeal of the present ordinance permitting the issuance of license in said village now in full force and effect." This motion was sustained and the license ordered to issue. The remonstrants appealed to the district court, where the action of the village board was affirmed, and the appeal dismissed. The remonstrants now appeal to this court.

As we view the case, the only question is as to the effect of the election upon the question of "license" or "no license," for it is conceded that a legal and proper election was held. It is provided in section 25, ch. 50, Comp. St. 1911, that "in incorporated cities and villages of less than 10,000 inhabitants, if thirty legal resident voters, or if there are less than sixty, a majority, who are also freeholders within the corporate limits of the city or village, at least thirty days before a municipal election, petition the proper authorities to have the question of 'license' or 'no license' submitted thereat, the question shall be submitted in the manner prescribed by existing law for the submission of other questions and the majority vote of those voting on the question shall be mandatory upon the licensing authorities." The contention that this provision of the statute is subject and subordinate to any ordinance that the board may enact cannot be maintained. It is true that before any license can be issued there must be an ordinance providing for the same (*State v. Andrews*, 11 Neb. 523), but that does not carry with it the imposition of the duty to issue a license where the board is satisfied that for any legal reason the license ought not to issue. The discretion of the board is not destroyed by the passage of such an ordinance. It is to be observed

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that by the provision of the statute it is left with the people of the village or city to direct the action of the board, when they see proper to do so, and when they do take action in the manner prescribed their decision shall be final, and, in so far as to whether license may or may not issue, the action of the majority should be mandatory upon the licensing authorities. "A 'mandatory' provision in a statute is one which must be observed, as distinguished from a 'directory' provision, which is one which leaves it optional with the department or officer to which it is addressed to obey it or not, as he may see fit." 5 Words and Phrases, 4332. "Mandatory. Containing a command; preceptive; imperative; peremptory." Black, Law Dictionary (2d ed.) 754. "In the construction of statutes, this word is applied to such as require to be obeyed, under penalty of having proceedings under them declared void." 2 Bouvier, Law Dictionary (Rawles' revision) 305. See 26 Cyc. 513. "Mandatory Statute. A statute the effect of which is that, if its provisions are not complied with according to their terms, the thing done is, as to it, void." Century Dictionary. "Mandatory. Containing a command; peremptory." Cyclopedic Law Dictionary. See *Hurford v. City of Omaha*, 4 Neb. 336, 351. Without citing any further authorities, and there are many others, it is clear that the provisions of the statute above quoted require that they *must* be obeyed, and that any act done in violation of its provisions is void. It was the clear purpose and intention of the legislature to remove the agitation of the question of "license" or "no license" from the jurisdiction and authority of the village board in all cases where the electors of the municipality assumed to take the matter in hand and decide the question for themselves. The board had no other jurisdiction nor authority than to do as directed by the people. If the "no license" vote was in the majority, their power over the question was entirely taken away and no license could legally issue for the current year. If the "license" vote was in the majority, the board might not arbitrarily re-

fuse to grant any licenses, but their discretion as to particular cases was not destroyed. It follows that the action of the board in granting the license was void.

Objection is made to the record presented to the district court, and now to this court. Prior to the hearing before the village board, it was stipulated that the proceeding might be taken down by the official stenographer of the district court, who was present, and that his transcript should be certified by the village clerk and deposited in the office of the clerk of the district court, should an appeal be desired by either party. While in some respects there may have been a departure from the usual course, we see no good reason why the parties might not, in the economy of time, enter into and follow such a stipulation. The transcript was duly certified by the village clerk, filed in the office of the clerk of the district court, and is certified to this court by the latter. But, even if the validity of the authentication of the evidence should be open to question, that fact could make no difference. It was shown by the remonstrance that a valid election had been held. All the board could then do was to examine the proofs of the fact, the evidence of which, attached to the remonstrance, was before them. If the election had been held resulting in a majority vote for "no license," they had no jurisdiction over the matter, and the only thing they could lawfully do was to obey the mandate of the statute and go no further with the hearing. The mere fact that an election had been held and "no license" voted deprived them of all power to act. The jurisdiction of the district court and this court cannot therefore be questioned.

Our attention is called to a certificate of the secretary of state setting out the legislative proceedings of 1881, by which chapter 50, Comp. St. 1911, was passed, and it would seem from the reading of appellee's brief that the regularity of the passage of the act by the legislature is attacked. This question was not submitted to the district court; the date of the certificate showing that it was

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issued long after the hearing in the district court, and nearly three months after the appeal was filed in this court. New questions cannot be sprung upon a case in that way in the appellate court.

It is claimed that the provisions of chapter 32, laws 1897, though never in force in the village of Rushville, should be considered here as throwing light upon the intention of the legislature of 1911 in passing the provision for election on "license" or "no license" herein above quoted. It is so plain that the two acts are separate and independent of each other, we will give the subject no further attention.

The judgment of the district court is reversed and the cause is remanded, with directions to reverse the order of the village board, cancel the license, and dismiss the application therefor. As the pretended license can afford no protection to the licensee, the action of the board should be taken at once.

REVERSED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

W. N. FORD ET AL., APPELLANTS, v. GEORGE E. DAVIS,
APPELLEE.

FILED DECEMBER 4, 1913. No. 18,144.

APPEAL from the district court for Sheridan county:
WILLIAM H. WESTOVER, JUDGE. *Reversed with directions.*

A. C. Plantz and M. F. Harrington, for appellants.

Allen G. Fisher, William P. Rooney and R. L. Wilhite,
contra.

REESE, C. J.

This is a companion case to that of *Ford v. Thompson*, ante, p. 658. It is submitted on a similar record and upon

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the same briefs and argument. The decision is therefore the same as in that case. The judgment of the district court is reversed, with directions the same as in that case.

REVERSED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

WILLIAM O. KEARNS, APPELLEE, v. OTTO F. BLUM,
APPELLANT.

FILED DECEMBER 4, 1913. No. 17,484.

1. Instructions complained of examined, and found to correctly state the issues made by the pleadings; and, while not very clear, they are held to be without reversible error.
2. Appeal: CONFLICTING EVIDENCE. Where the issues made by the pleadings are submitted to a jury on conflicting evidence, their verdict will not be set aside, unless it clearly appears to be wrong.

APPEAL from the district court for Harlan county:
HARRY S. DUNGAN, JUDGE. *Affirmed.*

W. S. Morlan, for appellant.

John Everson, contra.

BARNES, J.

This action was commenced in justice court. It was appealed to the district court, and plaintiff there sought to recover \$75 alleged to be due him from the defendant, and also a balance alleged to be due him from the defendant for hauling, and pasturing a horse, amounting to \$29.75. The total amount claimed by plaintiff was \$104.75.

By his answer the defendant admitted the purchase of the horse, but alleged that he received it in payment for a balance due to him from plaintiff on an old account, and

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denied each and every other allegation contained in plaintiff's petition. Defendant further alleged that plaintiff leased certain real estate situated in Harlan county, Nebraska, from defendant, and was a tenant upon the land so leased, beginning on the 1st day of March, 1907, and ending on the 1st day of March, 1911; that for the first three years of said time plaintiff and defendant owned cattle and hogs which were kept on said farm, and the plaintiff, under the terms of his lease, was to cultivate said land and feed and care for all of said stock, and when said stock was sold each of the parties was to receive a share thereof; that the defendant was also to receive a share of the cream and other property sold from said farm; that in the fall of 1908 plaintiff became indebted to defendant for defendant's share of cattle, cream, hogs and wheat sold by the plaintiff, to the amount of \$170; that in the fall of 1909 plaintiff became indebted to defendant in the sum of \$77, a balance due the defendant from the plaintiff for his interest in the cattle sold to plaintiff, and for certain cattle purchased by plaintiff from the defendant; that during the last year of said tenancy the plaintiff, under the terms of his lease, was to pay defendant \$75 for pasture rent, and was to deliver to defendant one-third of all corn crops grown on the premises, and also two tons of baled hay; that plaintiff failed to pay to the defendant the sum of \$75, due under the lease for 1910, and failed to deliver to defendant the two tons of baled hay, as provided for in said lease, and the said hay at the time it should have been delivered to the defendant was reasonably worth \$5 a ton; that at the time of the purchase of said horse plaintiff also owed defendant the sum of \$8 for a wheat drill sold and delivered to plaintiff by the defendant; that the sums due from plaintiff to the defendant on account of said items amounted to \$190, for which sum, with costs of suit, defendant prayed judgment.

The plaintiff, by his reply, admitted that he entered into the possession of certain lands of the defendant on

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or about the 1st day of March, 1907, but not as a tenant, as alleged by defendant; that their contract was in writing, and by its terms expired March 10, 1910; that the contract constituted a partnership agreement, and was not a lease, as alleged by defendant; that plaintiff occupied said premises for the year ending March 1, 1911, as a tenant, as set forth in defendant's answer; that by the terms of the written contract the parties thereto were interested jointly in the property mentioned in the answer of the defendant, and each and every item of the charges constituting the alleged cause of action in said answer and cross-petition of the defendant, it was alleged, "relate wholly to said partnership property dealings;" that no settlement of their partnership accounts has ever been made, and no balance has ever been struck in favor of either party, though the plaintiff has made repeated demands upon the defendant for a settlement thereof, and defendant has refused to tender to the plaintiff an account of the items claimed against him. Plaintiff denied each and every other allegation contained in the answer, and prayed that the items claimed by the defendant under the written contract might be excluded from consideration until a settlement thereof had been made by a court of equity.

A trial was had to a jury, and on the 12th day of December, 1911, a verdict was returned in favor of the plaintiff for the sum of \$95.97. A motion for a new trial was overruled, judgment was rendered upon the verdict, and the defendant has brought the case to this court by appeal.

On the trial the defendant put in evidence a written contract which contained the lease in question, and an additional agreement as follows: "That first party is to furnish the following stock, to be placed on said premises during the term of this lease, under the terms herein named, to wit: Ten head of cows, to be valued at \$250, or \$25 per head; eleven head of yearling cattle and calves, valued at \$170; ten head of brood sows, valued at \$91,

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and two-thirds interest in one Poland-China boar, valued at \$6. The said second party is to furnish on said place the following personal property, to wit: Five head of milch cows, valued at \$125; five head of brood sows, valued at \$55; and five head of calves, valued at \$50; and one-third interest in said boar, valued at \$3; said property of each party to be fed and cared for on the place by said second party out of the crops raised on said place, but from this date, to the crop is raised on said place, second party is to furnish two-thirds of the grain and feed for said stock, and first party is to furnish one-third of the same, and at the expiration of this lease and agreement said stock is to be sold, or divided, as follows: First party is to take sufficient stock or cash from the sale of the same, in equal value of the stock he now furnished, to wit, \$454, and second party is to take out of the proceeds of the sale of said stock, or stock of the value of the amount he now furnishes, to wit, \$233, said stock to be sold or divided as parties may agree upon, and if parties cannot agree to settle the matter by arbitration, each party selecting a man and them a third. * * * After said parties each are paid back, the value of the stock herein agreed to be placed on the place, as above specified, the balance of said stock, including increase, to be divided as follows: Second party is to have two-thirds, and first party one-third. All feed, crops, grain, stock and cream sold from the place during the pendency of this agreement is to be divided as follows: Second party two-thirds, and first party one-third, but the property herein placed on the place is not to be sold at any time without the consent of both parties."

In their testimony both parties, in speaking of this agreement, called it a partnership agreement; and their testimony was evidently taken into account by the district court in construing the contract to be in effect a partnership agreement as far as it related to the live stock.

The defendant assigns error for the giving of the

second and third instructions, and argues that those instructions erroneously stated the allegations of the defendant's answer. By instruction No. 2 the court told the jury that the defendant admitted buying the horse of the plaintiff, but alleged that the price of the horse was to be applied on an indebtedness owing by the plaintiff to the defendant, and that the burden of proof was upon the defendant to convince the jury by a preponderance of the evidence that the plaintiff agreed to allow the value of the horse to be applied on such alleged indebtedness; and, if the defendant failed to establish said agreement by a preponderance of the evidence, then the jury should return a verdict for the plaintiff for a balance due on the horse; and in such sums as they might find due, from the evidence, for pasture and feed for a horse, and for hauling, if any, unless the jury should further find that defendant has by a preponderance of the evidence proved a settlement of the partnership accounts, as alleged in his answer, and the amount which plaintiff acknowledged to be due thereon. By instruction No. 3 the jury were informed that the defendant had pleaded a settlement and a balance due on a certain partnership account, that the burden was upon the defendant to prove that he and the plaintiff made a settlement in 1908, and that plaintiff acknowledged that there was a balance due from plaintiff to defendant, and the amount of said balance; that the burden of proof was upon the defendant to show that he and the plaintiff made a settlement of their partnership accounts in the fall of 1909, and that they agreed upon the amount due from plaintiff to defendant, and that if defendant failed to convince the jury by a preponderance of the evidence that such settlements were made, and that the amount due was agreed upon, and failed to convince them by a preponderance of the evidence that plaintiff agreed that the purchase price of the horse might be applied upon the indebtedness owing by the plaintiff to the defendant, then the verdict should be for the plaintiff in a sum not to exceed \$104.75, with 7 per cent. interest

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thereon from March 1, 1911. As we view the pleadings and the testimony, the instructions complained of fairly stated the issues which the jury were required to determine.

The defendant also assigns error in giving instruction No. 4, which reads as follows: "In the reply filed by the plaintiff in this case the plaintiff alleges that the items sued on by the defendant relate to a partnership which existed between the plaintiff and defendant under exhibit 'A,' which was introduced in evidence, and that no settlement of the partnership matters and accounts has ever been made. The court instructs you that, under the provisions and conditions of said contract, it is a partnership agreement; and if you find that the items claimed by the defendant in his answer refer to or arose out of the transactions under and by virtue of said contract, and you further find that there has been no settlement or agreement whereby the same have been settled and a balance assented to between the parties of all of the items of both parties thereon, then you will disregard all of the items arising under said contract and sued for by the defendant, even though those items sued upon by defendant may have been agreed to and admitted to be correct on the part of the plaintiff Kearns."

It is contended that this instruction was erroneous; that the contract was not one in the nature of a partnership agreement; and that as the evidence failed to show any final settlement between the parties, the jury were prevented from considering the justness of defendant's claims. As we view the record, the court correctly interpreted the contract so far as it related to the live stock placed upon the farm by the plaintiff and the defendant, and to that extent the agreement was a partnership agreement. It follows that the instruction, although it was not so clear as it might have been, was not erroneous.

It is also contended that the verdict is unsupported by the evidence, and is contrary to law. An examination of the record discloses that there was a sharp conflict in the

evidence. The plaintiff produced evidence supporting, or tending to support, his cause of action. The defendant in effect admitted the sale of the horse, and testified that he was to have it for an old debt that the plaintiff owed him. This plaintiff positively denied. The defendant introduced the written contract in evidence, and gave testimony tending to show that there was a balance due him under the terms of the agreement. On the other hand, the plaintiff produced evidence showing that he had paid the defendant certain sums of money arising from the sale of the live stock and the other property in question, and that there was nothing due from him to defendant on account of those transactions. As a matter of fact both parties produced evidence tending to establish their several claims. It is evident from the record that the jury believed the plaintiff and his witnesses to the exclusion of those of the defendant, and we do not see our way clear to set aside their verdict.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

ROSE, FAWCETT and SEDGWICK, JJ., not sitting.

WILLIAM J. COURTRIGHT, APPELLANT, v. DODGE COUNTY,
APPELLEE.

FILED DECEMBER 4, 1913. No. 18,220.

1. **Taxation: ASSESSMENT.** "A state may make the ownership of property subject to taxation relate to any day or days or period of the year which it may think proper; and the selection of a particular day on which returns of their property for the purpose of assessment are to be made by taxpayers does not preclude the making of assessments as of other periods of the year." *Shotwell v. Moore*, 129 U. S. 590.
2. ———: ———. Section 37, art. I, ch. 77, Comp. St. 1911, requires the assessor to list property brought into this state by any person

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after April 1st and before July 1st, which is found in the possession of the owner, for taxation; and provides that the owner, in order to escape taxation thereon, shall show to the assessor, under oath, and by producing a copy of the assessment duly certified to by the proper officer of the state or county in which said property was assessed, that said property has been listed for taxation for that year in some other county in this state, or in some other state or territory of the United States, or that said property has been received by him in exchange for money or property listed for taxation during that year.

3. ———: ———: EVIDENCE. An affidavit of the owner of such property that he did not own it on the 1st day of April, and did not bring it into the state since that date, is insufficient to authorize the assessor or the county board of equalization to strike such property from the assessment rolls.

APPEAL from the district court for Dodge county:
CONRAD HOLLENBECK, JUDGE. *Affirmed.*

Courtright & Sidner, for appellant.

F. W. Button, contra.

BARNES, J.

Appeal from a judgment of the district court for Dodge county, affirming an order of the board of equalization of that county assessing an automobile for taxation for the current year. The cause was tried upon the following stipulation: "It is admitted by the parties to this action that on April 15, 1913, the appellant, William J. Court-right, purchased an automobile, the same being the one which was assessed to him; that previous to said time he did not own, have charge of or have in his possession any automobile; that he did not return any automobile for assessment, but assessment was made by the county assessor after the return was made, and on June 9, 1913; that said automobile was purchased at Omaha, Nebraska, on April 15, 1913, and the same was delivered to appellant on said date at Omaha, Nebraska; the purchase of said automobile being made from the Rambler Motor Company, which the parties to this action understand to be

a branch office or a branch of the Thomas B. Jeffery Company, a corporation which manufactures said automobiles outside of the state of Nebraska, and that said automobile is of the 1913 model, and was brought into Nebraska by the Rambler Motor Company of Omaha prior to April 15, 1913.

"It is further stipulated and agreed by the parties to this action that there was no arrangement or contract entered into between the purchaser and the Rambler Motor Company before the purchase originated on the 15th day of April, 1913.

"It is agreed by and between the parties to this action that this case shall be and is hereby submitted to the court without a jury under the foregoing stipulation of facts, and the court shall determine as to whether or not the appellant shall be assessed for said automobile. It is admitted that the appellant is and has been a resident of Dodge county, Nebraska, for years past."

It thus appears that the automobile in question was owned by appellant, Courtright, on the 15th day of April, 1913, and was found in his possession in Dodge county, Nebraska, immediately after that date. It also appears that appellant did not own the machine on April 1, 1913, and that he did not himself bring it into this state before that date, but it was brought here by some other person.

On the foregoing facts it is contended by the appellant that because he was not the owner of the machine on the 1st day of April, 1913, and did not bring it into this state, it is not taxable to him for that year; in other words, that he is not required to pay the tax thereon which the board of equalization assessed against him. To determine the question thus presented requires an examination of some of the provisions of the revenue law of 1903. Section 28 of that law (Comp. St. 1911, ch. 77, art. I) provides: "Every person of full age and sound mind, being a resident of this state, shall list all his moneys, credits, bonds, or stocks, shares of stock or joint stock or other companies, when the capital stock of such company is not

assessed in this state, moneys loaned or invested, annuities, franchises, royalties, and all other personal property." To that end the revenue act provides that a schedule containing a full list of the various forms of personal property liable to assessment shall be furnished by the assessor to each taxpayer, who shall make out, and verify by his oath, a statement of all personal property which he is required to list for taxation. The taxpayer, after completing his list, is required to attach thereto the oath, which reads as follows: Section 52. "I, ———, being duly sworn, say that the foregoing statement and schedule is true and contains a full and complete list of all property held by or belonging to me on the first day of April, including all personal property pertaining to merchandising, whether held in actual possession or having been purchased with a view to possession or profit. * * * I further swear that, since the first day of April of last year, I have not directly or indirectly converted or exchanged any of my property temporarily, for the purpose of evading the assessment thereof for taxes, into nontaxable property or securities of any kind, or transferred or transmitted the same to any person or in anywise for the purpose of evading the assessment thereof, and that my answers to the foregoing interrogatories are true."

It is appellant's contention that only such property as a taxpayer owned on the 1st day of April is liable for taxation for the current year, and this contention seems to be based on the proposition that the oath attached to the schedule is required to be made with reference to that date. This contention, were there no other provisions relating to the assessment of property contained in the revenue act, would be unanswerable, but the legislature, in order to prevent property owned by the taxpayer which is acquired by him during the period provided for making the assessment from escaping taxation for the current year, by section 37, art. I, ch. 77, Comp. St. 1911, provided: "When any person shall bring personal property into the state after the first day of April and prior to the

first day of July in any year, it shall be the duty of the assessor to list and return such property for taxation that year, unless the owner thereof shall show to the assessor, under oath, and by producing a copy of the assessment duly certified to by the proper officer of the state or county in which said property was assessed, that the same property has been listed for taxation for that year in some other county in this state, or in some other state or territory of the United States, or that said property has been received by him in exchange for money or property already listed for taxation during that year."

In construing the provisions of the revenue law all parts of it should be considered together; and, as we view its provisions, it was the evident intention of the legislature to provide for the taxation of property acquired by the taxpayer at any time after the 1st day of April, when he is supposed to have made oath to the schedule of property returned by him, and the 1st day of July of the current year, and it is made the positive duty of the assessor to list property found in the possession of the taxpayer and owned by him which has been brought into the state by any person during that period. To sustain the appellant's contention would in effect destroy the whole purpose of the provision of the revenue law above quoted. This provision cannot work a hardship to the taxpayer, because it is within his power, and the law makes it his duty, to make oath, and produce a copy of the assessment duly certified by the proper officer of the county in which the property was assessed, that said property had been listed for taxation for that year in some other county in this state, or in some other state or territory of the United States, or that the property in question has been received by him in exchange for money or property already listed for taxation during that year.

As above stated, the assessor of Dodge county found the automobile in question in the possession of and owned by appellant shortly after the 15th day of April, 1913. It thereupon became the plain duty of the appellant, if he

desired to escape taxation of the automobile for that year, to make oath and produce the certificate showing that the property had been assessed, either in some other county in this state, or some other state or territory, or that he had obtained it in exchange for other money or property which he had already listed for taxation for that year. The appellant did not comply with the provisions of this section of the revenue law, and therefore the trial court had no alternative but to sustain the action of the assessor and the board of equalization in listing the automobile for taxation.

Appellant cites *Gaar, Scott & Co. v. Sorum*, 11 N. Dak. 164, and relies principally upon that decision to sustain his contention. As we understand it, that decision is based upon the revenue law of the state of North Dakota, which differs materially from the revenue law of this state. To follow the rule there announced would in effect annul all of the provisions of the revenue law relating to the taxation of property other than that which was actually owned by the taxpayer on the 1st day of April of the current year, and hence we decline to follow it. Again, the revenue law provides for the taxation of live stock brought into this state from other jurisdictions between the 1st day of April and the first day of July of each year, and this provision has been upheld by this court. In *Mercantile Incorporating Co. v. Junkin*, 85 Neb. 561, it was said: "The taxing power vested in the legislature is without limit, except such as may be prescribed by the constitution itself. The maxim, '*expressio unius est exclusio alterius*,' does not apply in the construction of constitutional provisions regulating the taxing power of the legislature." In *Shotwell v. Moore*, 129 U. S. 590, it was said: "A state may make the ownership of property subject to taxation relate to any day or days or period of the year which it may think proper; and the selection of a particular day on which returns of their property for the purpose of assessment are to be made by taxpayers does not preclude the making of assessments as of other periods

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of the year." It thus appears that these provisions of the revenue law are sustained by respectable authority.

We come now to consider the objection made by the appellant to the board of equalization, which reads as follows: "To the County Board of Equalization of Dodge county, Nebraska, and to Charles R. Schaeffer, County Assessor: You are hereby notified that on April 1, 1913, I did not own any automobile and had not contracted for the purchase of any, and have not brought any automobile into the state of Nebraska, and that your assessment or proposed assessment to me of an automobile is without authority and improper and contrary to the statutes, and objection and exception is hereby taken thereto. You are requested to cancel said assessment, if one has been made." (Signed and verified by W. J. Courtright.) No other evidence was offered before the board of equalization in support of this objection, and the only evidence introduced at the trial in the district court was the stipulation above quoted. It therefore seems clear that the appellant failed to establish any fact which would authorize the assessor or the board of equalization to permit him to escape taxation on the automobile in question for the current year.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

HENRY B. PEITZMIEIER, APPELLEE, V. COLFAX COUNTY,
APPELLANT.

FILED DECEMBER 4, 1913. No. 17,402.

1. **Counties: BRIDGES: CONSTRUCTION AND MAINTENANCE.** In this state, counties, in the construction and maintenance of bridges, are bound to provide for such uses as may fairly be anticipated for the proper accommodation of the public at large in the various occupations which, from time to time, may be pursued in the locality where the bridge is situated.
2. **Evidence examined, and held sufficient to support the verdict.**

APPEAL from the district court for Colfax county:
GEORGE H. THOMAS, JUDGE. *Affirmed.*

W. I. Allen and B. F. Farwell, for appellant.

A. E. Garten and George W. Wertz, contra.

LETTON, J.

The plaintiff, a resident of Colfax county, was the owner of a steam threshing outfit. He attempted to cross a bridge in that county with the engine and separator, when the bridge gave way, and the machinery, with the plaintiff and others, were precipitated into the creek, breaking the plaintiff's leg and otherwise injuring him severely, practically destroying the separator and damaging the engine. The petition alleges that the bridge was defective in construction and dangerous to public travel; that the iron work was insufficiently fastened to the piers; that the bridge, in a number of particulars set forth, was improperly constructed, and that plaintiff was without notice of such defects. The answer was a general denial, with a plea of contributory negligence. Judgment for plaintiff for \$3,000, from which the county appeals.

The testimony of an experienced bridge engineer on behalf of plaintiff was to the effect that the bridge was defectively constructed; that a number of the bolt holes in the knee braces in which bolts should have been placed in order to make a firm and substantial structure had no bolts in them at the time he examined the bridge, and the condition of the paint in the steel work showed there never had been bolts in these holes; that the trusses under the bridge were not properly fastened to the piers; that one of the piers was considerably out of plumb; that the bridge was improperly braced and not held rigidly in place; that, on account of such defective construction, when weight came upon this bridge it would have a tendency to buckle and give way. Plaintiff testified that he and his men laid plank upon the flooring of the bridge for

the engine and separator to cross upon; that just after the engine had gone upon the bridge they stopped, at that time the separator then being upon the approach. The object in stopping was that the two planks over which the engine had moved could be removed and placed ahead in order to complete the planking across the span; that the engineer then moved the engine ahead slowly about six feet, when the bridge swung to the west, buckled, and gave way; that plaintiff fell into the water partly under the engine breaking his leg at the ankle. This testimony was corroborated by a number of other witnesses who were there present. They also corroborated the testimony with respect to the insufficient fastening of the bridge to the piers, and as to one pier being from 16 to 18 inches out of plumb. Another witness testified he had crossed this bridge in June of the same year with a load of sand, and that the bridge trembled and shook so under the load that he became frightened; that his four horses, wagon and load, all taken together, weighed nearly $6\frac{1}{2}$ tons. Plaintiff's evidence also shows that the engine weighed about 11 tons without water and coal; that at the time of the accident he had one barrel of water and one-half ton of coal in the tender; that the separator weighed about 5 tons; that, when the engine started just before it fell, the separator stood on the approach still coupled to the engine.

On behalf of defendant it was shown by a number of owners of threshing machines that their general custom in crossing bridges is to uncouple the engine from the separator, cross the bridge with the engine, then fasten a cable to the separator and draw it across separately; that if the flooring of the bridge is good and sound it is unnecessary to plank the bridges. But on cross-examination it developed that several of these witnesses had never crossed a steel bridge with their machinery. The county surveyor testified that he examined three of the knee braces to the bridge the day after the accident and found all the bolt holes properly filled with bolts. On cross-

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examination this testimony was weakened by the fact that upon being shown exhibit "K," afterwards identified as one of the knee braces taken from the bridge, he admitted that the bolt hole seemed to be filled with red paint of the same color and character as applied to the outside of the steel, thus bearing out the testimony of plaintiff's witnesses that a number of the bolt holes were filled with paint. The foreman of the work on the bridge and several other witnesses testified that bolts were put into all the places required, and described the method of fastening the bridge to the piers. The foreman of the work further testified that the bridge was erected in all respects in a proper manner. One of the county commissioners testified that soon after the erection of the bridge he examined it and found all bolts in place; that on the day of the accident he pulled out three of the anchor bolts from the piers, and he produced them in court. Another member of the county board also testified to examining the bridge at the time of its completion. An experienced bridge engineer testified that the knee braces were properly constructed, and that the method of placing the anchor bolts was that approved by competent engineers. It was also shown that the weight of the entire machinery of the plaintiff was about 35,000 pounds; that the engine weighed about 23,600 pounds without water or fuel, and the separator about 11,000 or 11,500 pounds. On cross-examination it was shown that there were three or four 20-horse power Reeves engines of the same type in Colfax county.

On rebuttal it was shown that there were seven 20-horse power engines in Colfax county at that time, and some larger ones, and four separators of about the same size as plaintiff's. Plaintiff also testified that the usual method of moving threshing machinery is to pull it across if the bridge is safe, but if unsafe to cable across. The testimony is voluminous, but the essential features are as related.

Four points are argued in the brief of the appellant. The first two are that the verdict is not sustained by suffi-

cient evidence, and is against the clear weight of the evidence. There was a direct conflict in the testimony as to nearly all the material points. The jury evidently believed that the bridge was defective, and that the plaintiff was not guilty of contributory negligence, and we think the evidence is sufficient to justify such conclusions.

The third assignment is that the verdict is contrary to law. Under this assignment the plaintiff has quoted at length from the note to *Kovarik v. Saline County*, in 27 L. R. A. n. s. 832 (86 Neb. 440) to establish the principle that "municipalities, in the construction and maintenance of bridges, are bound to provide for such uses as may fairly be anticipated for the proper accommodation of the public at large in the various occupations which, from time to time, may be pursued in the locality where the bridges are situated, but that they are not bound to provide for the support of unusual and extraordinary loads." And, further: "But where the use of the highways by such machines (heavy traction engines) in the locality is unusual and extraordinary, the bridges need not be constructed and maintained in a condition to carry them, and the municipalities cannot be held liable for damages resulting from their insufficiency."

The trial court, at defendant's request, instructed the jury, as follows: "The jury are instructed that, in an action against a county to recover damages alleged to have been caused by the breaking down of a bridge while the plaintiff was attempting to cross it with a steam traction engine and separator, it is for the jury to determine, from the evidence, whether or not the bridge was properly constructed and maintained, and whether the use the plaintiff was making of it was unusual and extraordinary, and such as the county was not bound to anticipate.

"The jury are instructed that, in maintaining a bridge for public use, the county is not limited in its duty by the ordinary business use of the structure, nor is it bound to provide for the support of extraordinary or unusually

heavy loads, but it is only bound to provide what may be fairly anticipated for the proper accommodation of the public at large in the various occupations which from time to time may be pursued in the locality where the bridge is situated. Whether or not the load which plaintiff drove on the bridge in question was an extraordinary or unusually heavy load is a question for you to determine from the evidence before you. * * *

"The jury are instructed that a county cannot be held as an insurer of those who have occasion to use a county bridge. If the defect in a bridge from which injury and damages occur to the person using it is a latent defect, not discernible from the ordinary tests and examinations usually made to ascertain its condition, and if those charged with such examinations have not been negligent in their duty in that regard, the county cannot be held liable for damages caused by such latent or undiscovered defects.

"The jury are instructed that, if they find that the use the plaintiff was making of the bridge was unusual and extraordinary and such as the county was not bound to anticipate, then the jury should find for the defendant."

These instructions seem to lay down the law in accordance with defendant's contention and with our views as expressed in *Seyfer v. Otoe County*, 66 Neb. 566, *Johnson County v. Carmen*, 71 Neb. 682, and *Kovarik v. Saline County*, 86 Neb. 440.

The bridge was built in the latter part of 1909. The accident occurred early in August, 1910. It had been safely crossed a number of times by 16-horse power engines, with separators weighing nearly as much as that belonging to plaintiff. The use of 16-horse power engines with large separators was common in Colfax county. A number of other engines and separators of larger size were also used therein. The bridge should have been made in the first place at least of ample strength to carry 16-horse power threshing machinery. The evidence shows that the difference in weight between 16-horse power en-

gines and 20-horse power engines of the same make is only 2 or 2½ tons. If but a small margin of safety had existed in the bridge over the strength absolutely required to carry ordinary threshing outfits, it would have been amply strong enough to carry the additional weight. The whole matter was left to a jury of the county, who were no doubt better fitted to judge of the sufficiency of the bridge to carry the loads reasonably to be expected in that locality than is this court.

Complaint is made of the reception in evidence of some of the knee braces taken from the bridge as incompetent, irrelevant and immaterial. The pieces were taken from the bridge the night before by unscrewing bolts which attached them thereto. This was nearly nine months after the accident. The evidence was not subject to the objection urged. Its weight and probative value may have been impaired by the long delay considering the chance of fabrication, but this, which is the ground argued here for exclusion, was for the jury. The objection to the question whether the contractor was under bond to the county should have been sustained, but the answer was so uncertain and indefinite we think the ruling without harm.

The case seems to have been fairly and impartially tried. The judgment is moderate in amount as compared with the injuries and damages proved. We find no prejudicial error, and the judgment of the district court is

AFFIRMED.

BARNES, ROSE and SEDGWICK, JJ., not sitting.

Deppe v. Colfax County.Wahlquist v. Adams County.

JOSEPH DEPPE, APPELLEE, v. COLFAX COUNTY, APPELLANT.

FILED DECEMBER 4, 1913. No. 17,632.

APPEAL from the district court for Colfax county:
GEORGE H. THOMAS, JUDGE. *Affirmed.*

W. I. Allen and B. F. Farwell, for appellant.

A. E. Garten and George W. Wertz, contra.

LETTON, J.

This is an action for personal injuries sustained by the plaintiff in the same accident involved in the case of *Peitzmieier v. Colfax County, ante*, p. 675. The two cases were argued and submitted together, the same alleged errors being relied upon. The decision in that case controls this. The judgment of the district court is

AFFIRMED.

BARNES, ROSE and SEDGWICK, JJ., not sitting.

RAINARD B. WAHLQUIST ET AL., APPELLEES, v. ADAMS COUNTY; U. S. ROHRER, APPELLANT.

FILED DECEMBER 4, 1913. No. 17,417.

Elections: PRINTING OF BALLOTS: LIABILITY OF COUNTY. It is the duty of a county to furnish ballots to be used at general elections. The county clerk is the duly authorized agent of the county to procure and furnish such ballots. Where by a mistake of the clerk the ballots first printed, which had been paid for by the county, were rendered useless, this fact did not relieve the county from the duty of procuring and furnishing at public expense new ballots for the use of the voters.

APPEAL from the district court for Adams county:
HARRY S. DUNGAN, JUDGE. *Affirmed.*

M. A. Hartigan and John Snider for appellant.

H. F. Favinger and J. W. James, contra.

LETTON, J.

In 1910 the county clerk of Adams county ordered from the plaintiffs, who are engaged in the newspaper and job printing business in Hastings, 10,000 official and 10,000 sample ballots to be used at the general election in November following. The ballots were printed and furnished, a claim was filed, a warrant issued by the county for \$165, and the amount paid. The county clerk made an error in the preparation of these ballots. On discovering this he made the necessary correction, and ordered the plaintiffs to print as corrected 10,000 official and 10,000 sample ballots. These were printed and furnished to the county. Plaintiffs filed a claim for \$100 for this work, which was allowed by the county board. The appellant Rohrer as a citizen and taxpayer appealed to the district court, where a trial was had and judgment rendered in favor of plaintiffs for \$90. Mr. Rohrer appeals to this court. No bill of exceptions was preserved.

The appellant demurred to the petition and objected to the introduction of evidence at the trial on the ground that the petition did not state facts sufficient to constitute a cause of action. His brief is confined to a discussion of this point. He bases his contention upon the provisions of sections 5807, 5820, Ann. St. 1911. Section 5807 provides, so far as applicable, as follows: "That all ballots cast in election for public officers within this state shall be printed and distributed at public expense, as hereinafter provided. The printing of ballots and cards of instruction for the electors in each county, and the delivery of the same to the election officers, as hereinafter provided, shall be a county charge, the payment of which shall be provided for in the same manner as the payment of other county expenses." Section 5820 provides, in substance,

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that the county clerk shall provide 75 ballots of each kind for every 50, or fraction of 50, voters registering or voting at the last general election in each election precinct or district; and further provides: "When a precinct or district shall be divided or the boundaries changed, the clerk must ascertain, as nearly as possible, the number of voters in the new district or districts, and provide therefor a sufficient number of ballots in the above proportion." By this section it will be seen that the number of ballots to be printed is not a fixed and certain quantity. It is a result of computation, and is subject in some degree to the discretion of the clerk. Section 5821, Ann. St. 1911, makes it the duty of the clerk, upon his own motion, to correct without delay any patent error which he may discover in the ballots or which may be brought to his attention, and provides a summary method of coercion if he fail so to do. Following section 22, art. I of the constitution, so jealous is the law of the rights of the voter that, if the clerk neglected to correct and furnish the electors with ballots as required, he is liable, under section 5833, Ann. St. 1911, to forfeit his office and to be fined and imprisoned.

The appellant's argument is that the statute makes no provision for reprinting the ballots, nor for payment for the same; that if, after the number of ballots for which the law provides have been printed and furnished, a mistake is discovered, then it is the duty of the clerk, and not of the county, to pay for the printing of correct ballots; that the clerk had no power to contract so as to make the county liable for the printing of more than the number of ballots fixed by the statute, which became a part of the contract, and that plaintiff could not recover for more than such number. The petition counts upon a contract made by the county clerk, who under the statute is the only authorized agent of the county to procure the printing of the ballots. The petition does not allege that the 20,000 ballots first ordered were all that were printed or required for the November election, and there is no allegation of the number which the clerk was authorized to procure.

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The statute requires a computation to be made by the clerk as to the number of ballots necessary for each precinct or district, and, where divided, he must use his own judgment as to the number required. He alone is vested with the power to determine the number of ballots necessary. This being so, the presumption is that he kept within the terms of his authority.

Moreover, the county is bound to have legal ballots printed so that a legal election as to each officer may be held. If the clerk through mistake has caused ballots to be printed which, if used, would invalidate the election in whole or in part, this would not relieve the county, upon ascertaining that such an error had been made, from the duty of procuring other and legal ballots. The fact that it had already paid for the erroneous ballots could not operate to relieve it from the duty of furnishing the voters with proper and legal ballots to be used at the election. It might lead to serious consequences if the court should hold that the refusal of a clerk to furnish new ballots at his own expense could operate to invalidate an election and thus disfranchise the citizens of a county. The county is the principal in the transaction; the clerk is merely its agent, and, regardless of what the relations of the county may be to its agent with respect to the matter, the printer was entitled to his just compensation from the county.

The judgment of the district court is

AFFIRMED.

BARNES, ROSE and SEDGWICK, JJ., not sitting.

ALMA F. HOWARD, APPELLEE, v. JOHN DUNCAN, APPELLANT.

FILED DECEMBER 4, 1913. No. 17,362.

Vendor and Purchaser: FALSE REPRESENTATIONS: RESCISSION. False representations by vendor that irrigable land in Colorado will produce particular crops of sufficient value to meet deferred

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instalments of the purchase price as they mature annually, that sufficient water for irrigation is available, and that the land is worth \$100 an acre, though its value is only \$40 an acre, may be sufficient to justify a rescission of the contract of sale, when made to and relied upon by a vendee residing in Nebraska, who never saw the land and was ignorant of its character and value.

APPEAL from the district court for Lancaster county:
WILLARD E. STEWART, JUDGE. *Affirmed.*

Charles A. Robbins, for appellant.

Hall & Bishop, contra.

ROSE, J.

This is a suit in equity to cancel a contract bearing date June 3, 1907, and obligating plaintiff to purchase from defendant for \$6,460 an 80-acre tract of land in Bent county, Colorado. Plaintiff also demands judgment for \$2,650, the amount paid on the purchase price. The right to rescind is based on alleged fraudulent representations inducing the sale. Defendant denied the fraud imputed to him, and pleaded that the real consideration for his land did not exceed \$5,000; that the expressed consideration included inflation in the value of real estate exchanged by plaintiff for the Colorado land; that plaintiff ratified the sale and defeated rescission by continued occupancy, by leasing the premises, by collecting rentals for two seasons, and by listing for sale at an increase in price the land conveyed to her. The trial court canceled the contract and entered a judgment in favor of plaintiff for \$2,260, and defendant has appealed.

Plaintiff agreed to purchase the 80-acre tract of Colorado land for \$6,800, being \$85 an acre. She was allowed a credit of 5 per cent. of the total as the commission of her son, H. B. Murphy, for making the sale for defendant. The difference, or \$6,460, was the consideration mentioned in the contract. Defendant agreed to accept as part of the purchase price, and plaintiff conveyed to him, an im-

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proved lot in Lincoln, Nebraska. It was exchanged at a valuation of \$4,250 and was mortgaged for \$1,600. The difference, or \$2,650, was acknowledged as a payment on the Colorado land. The balance of the purchase price of the 80-acre tract, \$3,810, was to be paid by plaintiff in seven annual instalments, the first and second being \$545 each, and each of the others \$544, all bearing interest at the rate of 6 per cent. per annum. The evidence justifies a finding that the Lincoln property was exchanged at its fair market value. It was sold and transferred by defendant before this suit was commenced, and for that reason plaintiff sought and recovered judgment for its value in lieu of the property itself. Defendant had an option to buy for \$40 an acre the quarter-section of which the land in controversy was the west half. Before he acquired title he tried to find a purchaser for it. With that end in view his agent, D. R. Cone, took plaintiff's son, H. B. Murphy, a prospective purchaser, from Fremont, Nebraska, to Colorado to see the land. There they met defendant. He and Murphy crossed the tract. Murphy was on the premises for perhaps an hour. He subsequently entered into a contract to purchase the east half. Defendant engaged him to negotiate with his mother for the sale of the west half, agreeing to pay him for his services in that capacity a commission of 5 per cent. on a purchase price of \$6,800. Murphy talked with his mother on the subject. Defendant made two trips to Lincoln to see her, and he talked with her about the matter on both occasions. The first conversation lasted from 15 to 30 minutes and the last consumed perhaps half an hour. Thus far the facts narrated, except as to the value of the Lincoln property, are established without substantial conflict in the evidence, though defendant insists that Murphy was his mother's agent.

Proof that defendant made false representations is directly contradicted by him, and from his standpoint his counsel has ably presented his case. In determining the issue of fraud, the relative situations of the participants in the transactions should be considered. The land re-

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quired irrigation. Defendant was an experienced dealer in real estate. He had lived in Colorado. He was familiar with the land and with the means of irrigating it. As an engineer he had been employed by the promoters of irrigation projects in the vicinity. Plaintiff lived in Lincoln. She had never seen the property and knew nothing about irrigation or irrigated lands. Her son was a commercial traveler, and, except for his visit to Colorado, was no better advised than his mother.

Plaintiff relies on representations made by defendant to her and to her son. There is proof that the representations to each were practically the same. For the purpose of testing the evidence of fraud, Murphy should be regarded as the agent of defendant. That defendant made representations to Murphy for the purpose of inducing him to purchase at least half of the quarter-section cannot be successfully refuted. Defendant's own testimony shows that he engaged Murphy to sell the west half of the quarter-section to his mother. The effect of the agency thus established was not destroyed by the subsequent act of the son in directing defendant to allow plaintiff credit for the commission. Defendant should be charged with any instrumentalities employed by his agent to bring about the sale to plaintiff.

Under the circumstances of this case, it is immaterial on the issue of fraud whether the representations were made to the son or to the mother, since they were communicated to her by defendant or by his agent or by both. She testified in substance that defendant, during his conversations with her, before she entered into the contract, described the particular growing crops and the purposes to which the soil is adapted, giving quantities and values. In this connection she said: "He assured me that I could realize enough on the land from the proceeds of it to finish paying it out." While the truthfulness of this testimony is denied by defendant, he admits that the son had procured from some source data from which he made calculations to show that the deferred payments could be met

with the proceeds of the land. The inference from all of the circumstances is that this data came directly or indirectly from defendant, and that plaintiff told the truth. There is convincing proof that the representations to which she testified were false. Plaintiff further testified in effect that defendant told her the land he was offering for \$85 an acre was worth \$100 an acre and could be sold for that. At that time he had an option to buy it for \$45 an acre. More than a year later he listed it for sale at \$65 an acre. There is also proof indicating that defendant misrepresented the amount of water available for irrigation. When plaintiff's ignorance of conditions and defendant's knowledge and experience are considered with her absence in Nebraska and his presence in Colorado, the fraudulent representations proved are material. That plaintiff relied upon them there can be no doubt. She sold her mortgaged home to make the initial payment. She was without means to make the first deferred payment on the purchase price when the proceeds of the land purchased proved to be insufficient. The demands of brevity have prevented an extended reference to the evidence, but all of the proofs and the observations of counsel thereon have been examined and considered.

The defenses of laches and ratification are not fully established. Having perpetrated fraud in the manner indicated, defendant, for reasons already suggested, is not in a position to exact of plaintiff extreme vigilance in discovering and renouncing it. He received property of the value of \$2,650 and attempted to forfeit plaintiff's contract for nonpayment of the first deferred instalment of \$545. Her right to redress should not be defeated because she retained the Colorado land more than a year. At the end of that period she was not fully advised of the fraud. She still hoped that another season would be more propitious.

Neither should relief be denied on the ground that plaintiff listed the land for sale at \$100 an acre. This act indicated a reliance on defendant's representations before she realized the extent to which she had been overreached.

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Defendant was credited with the first season's rentals. Plaintiff testified that she did not receive a cent from that source for the second year, and the evidence does not sufficiently show what her son received or his authority to act for her in making collections.

The findings below are here adopted as correct.

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

STATE OF NEBRASKA V. HENRY ROY.

FILED DECEMBER 4, 1913. No. 17,419.

Criminal Law: APPEAL: DISMISSAL. An appellate proceeding under section 515 of the criminal code to settle a point of law in a prosecution, wherein accused was discharged, may be dismissed for failure of the county attorney to refer in his brief to the volume, page or section where acts of congress, on which the ruling below is based, are published or may be found.

ERROR to the district court for Knox county: ANSON A. WELCH, JUDGE. *Dismissed.*

Grant G. Martin, Attorney General, P. H. Peterson and E. A. Houston, for plaintiff in error.

W. A. Meserve, contra.

ROSE, J.

In a prosecution by the state in the district court for Knox county, the county attorney filed an information charging that Henry Roy committed an assault upon Lucy Brokenjaw with intent to commit rape. Accused filed a plea in abatement, asserting that he and prosecutrix are Indians, that the place of the alleged assault is on an

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Indian reservation in Indian country on land allotted to an Indian and over which the United States has exclusive jurisdiction. The state filed an answer to which accused demurred. The trial court sustained the demurrer and dismissed the prosecution. For the purpose of settling the question of law raised by the demurrer, the county attorney, under section 515 of the criminal code, was permitted to present here an exception to the decision below.

Did the district court for Knox county have jurisdiction to try accused and to punish him, if guilty? The determination of this question depends upon provisions of certain acts of congress. The county attorney in his brief has not pointed out the volume, page or section where these laws are published or may be found. In this respect there is an utter disregard of court rules. To determine the merits of the exception would require a research and references which should have been made by counsel. The rights of other litigants, the dispatch of business and the enforcement of court rules require the dismissal of the appellate proceeding. Appellate proceeding

DISMISSED.

EDWARD M. BIRDSALL, APPELLEE, V. CHICAGO & NORTH-
WESTERN RAILWAY COMPANY, APPELLANT.

FILED DECEMBER 4, 1913. No. 17,439.

Trial: QUESTION FOR JURY: NEGLIGENCE. The issue of negligence should be submitted to the jury, where reasonable men may draw diverse inferences from all of the circumstances proved.

APPEAL from the district court for Dawes county:
WILLIAM H. WESTOVER, JUDGE. *Reversed.*

A. A. McLaughlin, Wymer Dressler and Edgar R. Hart,
for appellant.

Albert W. Crites, *contra.*

ROSE, J.

This is a suit to recover the value of a mare alleged to have been killed on defendant's railroad track. The substance of the case pleaded by plaintiff is that at a farm-crossing about a mile west of Chadron defendant negligently left a gate open between a pasture and the railroad; that the animal strayed through the opening upon the railroad track and was struck by a locomotive; that defendant was negligent in operating its train, failing to stop it in time to prevent the collision. Defendant denied negligence. The case was tried to a jury. There was evidence on both sides. The trial court directed a verdict for plaintiff, and from a judgment in his favor for \$197.35 defendant has appealed.

One of the assignments is that the trial court erred in directing a verdict for plaintiff. The parties do not agree on the facts proved or on the inferences to be drawn therefrom. Though two abstracts have been filed, the entire bill of exceptions has been read to find a justification for the peremptory instruction.

1. From the evidence, would reasonable men draw the inference only that defendant was negligent in leaving the gate open? The right of way had been fenced by the railroad company. The next friend, the father of plaintiff, owned the pasture. The ranch of which the pasture was a part was occupied by a tenant. The gate and the farm-crossing were maintained for the convenience of the landowner and his tenants, but were frequently used by others. The accident occurred December 27, 1909. Plaintiff proved by one of his witnesses that the gate was found open and left closed Christmas morning. How it was afterward opened before the mare was killed or by whom is not proved. Actual knowledge of defendant that it was open between December 25 and December 27 is not shown. Whether defendant was chargeable, if at all, with constructive notice that it was open in the interim in time to close it before the mare strayed from the pasture would,

in the aspect most favorable to plaintiff, be a question for the jury. A witness for plaintiff said that the gate was made of boards and was not long enough to slide between two posts which stood at the end where it closed. He admitted, however, that it would rest against one of the posts, and there is nothing to show that in this condition it would not protect stock from the railroad track. Besides, a defect in the gate or in the fence was not pleaded. The issue that the gate was negligently left open was not established as a matter of law.

2. Was it established as a matter of law that the negligent operation of defendant's train was the proximate cause of the injury? Plaintiff asserts that the mare was struck in daylight on a track where she could be seen from defendant's engine for nearly a mile. There is no testimony by any eye-witness. When or by what train the animal was struck is left in doubt. Evidence tending to show that the accident occurred in the daytime conflicts with other proof. In addition, plaintiff adduced evidence that between the gate and the place where the mare was struck there were horse tracks beside the railroad grade on one side of the right of way, if not on both. For anything appearing in the record the mare may have run suddenly and unexpectedly onto the track ahead of a train which could not be stopped in time to prevent a collision. Reasonable men may draw different inferences from all of the circumstances which tend to show negligence on part of defendant. The sufficiency of the evidence to sustain a verdict in favor of plaintiff is neither presented nor decided.

For the error in directing a verdict, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

STATE, EX REL. MICHEL A. HARTIGAN ET AL., APPELLANTS,
v. JOHN H. UERLING, APPELLEE.

FILED DECEMBER 4, 1913. No. 17,447.

1. **Counties and County Officers: REGISTER OF DEEDS: ACCOUNTING.**
As soon as the register of deeds makes, and the county board approves, his annual accounting, it is his duty to turn over to the county treasurer all fees in excess of statutory compensation for official services.
2. ———: ———: ———: **MANDAMUS.** Where the annual accounting between the county board and register of deeds has been duly made and approved, the latter may be required by mandamus to turn over to the county treasurer all fees in excess of statutory compensation for official services.

APPEAL from the district court for Adams county:
HARRY S. DUNGAN, JUDGE. *Reversed with directions.*

M. A. Hartigan, for appellants.

Tibbets, Morey & Fuller, contra.

ROSE, J.

This is an application on behalf of Adams county for a peremptory writ of mandamus directing respondent as register of deeds to turn over to the county treasurer the balance of the fees in his hands for the year 1910, after deducting the statutory compensation for the official services of himself and his deputy. There is no dispute about the facts. For the year 1910 respondent collected in fees \$3,246.80. He lawfully retained \$1,500 for himself and \$1,000 for his deputy, leaving in his hands at the close of the year's business, after an accounting approved by the county board, \$746.80. Upon demand respondent refused to turn the balance over to the county treasurer. To co-erce performance of that duty is the purpose of this proceeding. The writ is resisted on two grounds: (1) As register of deeds respondent properly retains the money to guard against any deficiency in the amount of fees avail-

able for payment of salaries during the remainder of his official term. (2) Mandamus is not the proper remedy. The trial court denied the writ, and relators have appealed.

1. Has respondent a right to retain the funds? A statute applicable to Adams county provides that each register of deeds whose fees in the aggregate exceed the sum of \$1,500 "in any one year after the payment of the necessary deputy and clerk hire shall pay such excess into the treasury of the county." Comp. St. 1911, ch. 18, art. I, sec. 77a. A year is manifestly the statutory period for an accounting. The county treasurer is the lawful custodian of any balance in favor of the county as soon as the correct amount is shown by a duly approved accounting or settlement. How he shall protect and handle such funds for the benefit of the county is the subject of other legislation. He does not share this responsibility with respondent. At the end of each year it is the duty of the register of deeds to turn over to the county treasurer all fees in excess of statutory compensation. Whether the county must make good deficiencies in compensation for succeeding years is a question not involved or decided.

2. Is mandamus the proper remedy? When relators made their application for the writ, it was definitely settled that respondent had in his hands \$746.80 in excess of lawful compensation for official services for the year 1910. The extent of the excess is not in controversy. To turn the balance over to the county treasurer is an official duty enjoined upon respondent by law. Mandamus is the proper remedy.

The judgment is therefore reversed, with directions to the district court to allow the writ at the costs of respondent in both courts.

REVERSED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

**ANNA K. BOWMAN, APPELLEE, v. WALTER GOODRICH ET AL.,
APPELLANTS.**

FILED DECEMBER 4, 1913. No. 17,389.

1. **Forcible Entry and Detainer: DEFENSES: LANDLORD AND TENANT: SALE OF PREMISES.** Where land leased has been sold under a decree in a suit to foreclose a lien for delinquent taxes, in which suit the lessor was a party and whose rights were foreclosed by such decree, and such sale has been duly confirmed and a deed issued to the purchaser thereat, and the lessee, upon exhibition to him of the sheriff's deed, in order to avoid eviction by the then owner of the paramount title, in good faith attorns to him, such action on his part may be interposed as a defense to an action by his lessor to recover possession.
2. **Justice of the Peace: JURISDICTION: TITLE TO REALTY.** And when such facts are made to appear in an action pending before a justice of the peace, the title to the real estate is drawn in controversy and it is the duty of the justice to refuse to proceed further.
3. ———: ———: ———: **APPEAL: DISMISSAL.** And if the justice wrongfully holds jurisdiction and enters judgment awarding plaintiff possession of the land, it is the duty of the district court on appeal, when such facts are made to appear in that court, to dismiss the action for want of jurisdiction.

**APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Reversed and dismissed.***

Leavitt & Hotz, for appellants. •

Wearer & Giller, George W. Shields and John Q. Burgner, contra.

FAWCETT, J.

This is an action of forcible entry and detainer, commenced in a justice court of Douglas county, to recover possession of a portion of lot 7, block 93, in the city of Omaha, known as 914 Dodge street. From a judgment in plaintiff's favor in justice court, defendants appealed to

the district court, where plaintiff again recovered, and the case is here for review.

The complaint is in the usual form and is based upon an oral lease which it is alleged was terminated by reason of nonpayment of rent about November 1, 1909. The answer challenged the jurisdiction of the court over the subject matter of the action, for the reason that the title to the real estate in controversy was necessarily involved and drawn in question. The trial court by its rulings in the course of the trial adhered strictly to the rule that a tenant cannot dispute the title of his landlord, and excluded evidence offered by defendants to show that, subsequently to their entry under the oral lease of plaintiff, a purchaser under a sale in a suit to foreclose a lien for delinquent taxes on the property in controversy, in which suit the plaintiff here was a defendant and whose rights were foreclosed by that decree, exhibited to them the sheriff's deed and served them with a "notice to quit;" and also refused to permit defendant to show that after the service of this notice they recognized such purchaser as their landlord, and thereafter paid rent to him. This raises the controlling question in the case. That is to say, could defendants, in order to avoid eviction by the owner of the paramount title under the sheriff's deed, attorn to him and use such action on his part as a defense to plaintiff's action to recover possession? We think this question must be answered in the affirmative.

The plaintiff's testimony shows that defendants went into possession in September, 1909, under an oral lease; that they paid one month's rent to October 10, 1909, and no more; that on November 11 she served the notice to quit and this action followed. The evidence offered by defendants, a part of which was at first received and then excluded by the court, shows the tax foreclosure proceedings, the regularity of which is not questioned, shows that the sheriff's deed to Henry W. Pennock was acknowledged October 27, 1909, and recorded the same day. The testimony of one of the defendants was that on October 29 the

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agent of Mr. Pennock exhibited this deed to him and on the same day served him with notice to quit. As already stated, he was not permitted to testify as to what he did subsequently to receiving the notice. We are unable to agree to the position taken by the learned district court. As soon as the above facts were made to appear, the question of title was drawn in controversy and it became the duty of the justice to refuse to proceed further. The justice having failed to take this course, the district court, on appeal, should have dismissed the action for want of jurisdiction. Our statute is plain and explicit that where the title to real estate is drawn in question a justice of the peace is without jurisdiction. Code, sec. 907. This holding is well sustained by authority. *Teich v. Arms*, 5 Cal. App. 475; *Simers v. Saltus*, 3 Denio (N. Y.) 214; *Corrigan v. City of Chicago*, 144 Ill. 537.

It follows from what has been said that the district court erred in the rulings complained of. The judgment is therefore reversed and the action dismissed.

REVERSED AND DISMISSED.

BARNES, LETTON and ROSE, JJ., not sitting.

LINCOLN SAVINGS & LOAN ASSOCIATION, APPELLEE, v. HARRY H. WEBBER ET AL.; NEBRASKA MATERIAL COMPANY, APPELLANT.

FILED DECEMBER 4, 1913. No. 17,401.

1. Mechanics' Liens: ITEMS OF ACCOUNT: ENTIRE CONTRACT. Where a materialman contracts with the owner to furnish material for the construction of a building, and during the course of construction a portion of the building is so damaged by fire as to necessitate the reconstruction of such portion, and the materialman, without further contract with the owner, furnishes the extra material required for such reconstruction, all of the material furnished will be treated as having been furnished under one contract.

2. —: DESCRIPTION OF PROPERTY. "In an affidavit for a mechanic's lien, if there appear enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, it will be sufficient." *Guiou v. Ryckman*, 77 Neb. 833.

APPEAL from the district court for Lancaster county:
WILLARD E. STEWART, JUDGE. *Reversed with directions.*

Talbot & Allen, for appellant.

Burkett, Wilson & Brown, contra.

FAWCETT, J.

Plaintiff brought suit in the district court for Lancaster county, to foreclose a mortgage on lot 2, in block 1, Replat of Sewall's Subdivision of Lincoln, Nebraska. The mortgage was recorded July 19, 1909. The defendant Lincoln Stone & Supply Company filed an answer and cross-petition claiming a lien under five judgments obtained July 7, 1910. The defendant Nebraska Material Company filed its answer and cross-petition for the foreclosure of a mechanic's lien, the same being for materials furnished the owner of the premises for the erection of a building upon the lot in question, and alleges that the first item of material was furnished March 20, 1909, and the last item May 27, 1910. The court found for the plaintiff and established its mortgage as a first lien; found for the defendant Lincoln Stone & Supply Company and established its claim as a second lien; found that the defendant Nebraska Material Company was not entitled to a lien and dismissed its action. The defendant Nebraska Material Company appeals.

The grounds upon which plaintiff and the stone company justify the decree entered below are: (1) That the material company's lien was not filed within the time required by law. (2) There was not a sufficient description of the property contained within the lien. We will consider these points in the order named.

1. The first item of material was furnished March 20, 1909. When the building was only partially constructed the owner of the property moved into the basement and continued to reside in the building until after its completion. His testimony as to just when he moved in is somewhat uncertain, but it was probably some time in the early summer of 1909. The work upon the building appears to have progressed slowly. About Christmas of that year the building was damaged by fire. The roof was badly damaged, as were also the plastering and one of the walls. This necessitated a restoration of the damaged wall and the repair of the damage to other parts of the building. The material furnished by the material company consisted of sand and hollow blocks. It made deliveries of material each month, after the fire, down to and including the month of May. On May 25 and 27 it made the last two deliveries. The lien hinges upon these two dates, as it was filed September 24, 1910, which would be within four months thereafter. It is urged that these later items were not furnished under the original contract for the erection of the building, but were furnished for repairs, which had been necessitated by the fire, and hence were furnished under a separate and subsequent contract. The evidence of the owner as to the contract is that, when he was about to begin the erection of the building, he purchased the sand, stone and cement from the material company, and that the company was to deliver it as he wanted to use it; that it was to be delivered when called for. He also testified that the material covered by the material company's lien was delivered at his place and used by him in the construction of the house. This testimony is not disputed, so that the only question upon this point is, was the material necessary, for the restoration of the work which had been partly finished and which had been damaged by the fire, so that the building could be completed in the manner contemplated when it was begun? We are unable to see how there can be any difference of opinion upon this point. The material company was to furnish the material

for the construction of the building. The building was not completed until the company had furnished the material in May, 1910. This long delay had doubtless been occasioned by the fire, but the material company was not responsible for the fire, nor was any additional or subsequent contract entered into between it and the owner of the building. There were 19 deliveries of material after the fire, viz., eight in January, 1910, four in February, one in March, four in April, and the last two in May. Suppose, instead of the fire which occurred at Christmas time, a high wind had blown down the wall and damaged the roof, or suppose that, through some blunder of the mechanics who were constructing the building for the owner, the wall and roof had been so defectively constructed that the owner would have required that they be torn down and rebuilt. Could that fact, by any rule of law or of equity, militate against the materialmen? We think not. In *Watkins v. Bugge*, 56 Neb. 615, we held: "Each order and delivery of material made at different times does not necessarily constitute a separate contract. To constitute a single contract it is not necessary that the materials should all be furnished at one time, but may be obtained at different times and still be embraced in a single contract, if such was within the contemplation of the parties." Was it within the contemplation of the parties, viz., the owner and the material company, that the latter was to furnish material for the erection of the buildings about to be constructed, until its final completion? Clearly, yes. The fact that the final completion was delayed, or the amount of material required was increased by reason of an accident that occurred in course of construction, in no manner destroys or modifies the principal fact which "was within the contemplation of the parties." We think the construction of the building, from the time it was begun until it was completed, months after the fire, was a single transaction, and that the material furnished by the material company was furnished under one contract.

2. Was the description contained in the affidavit at-

tached to the lien a sufficient description? The affidavit recites that the itemized account is true and correct; that the material was furnished for the owner "under a verbal contract, for the erection of a dwelling and other improvements and appurtenances, pertaining to and belonging on the following described lot, piece, or parcel of land, viz.: Lot number two (2) in block number one (1) in the Replat of Sewall's Subdivision." It will be observed that the affidavit does not state where the Replat of Sewall's Subdivision is located. It does not name the state, county or city. The rule is settled in this state that, "In an affidavit for a mechanic's lien, if there appear enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, it will be sufficient." *Guiou v. Ryckman*, 77 Neb. 833. It is also the settled rule that, the object of the mechanic's lien law being to secure the claim of those who have contributed to the erection of a building, it should receive the most liberal construction to give full effect to its provisions. *Rogers v. Omaha Hotel Co.*, 4 Neb. 54. Cited with approval and followed in *Henry & Coatsworth Co. v. Fisherlick*, 37 Neb. 207, 221. Applying these rules, was the description sufficient? In other words, would any one "familiar with the locality," that is to say, with Sewall's subdivision, be able with reasonable certainty to locate lot No. 2 in block No. 1, in that subdivision? It is said, no state, county or city is named. We think these omissions, while careless, are not sufficient to defeat the lien. The lien was duly filed in Lancaster county. The records of Lancaster county would show where, in that county, the property included in the Replat of Sewall's Subdivision was located. Any abstracter would have shown the lien in an abstract of title to the lot named, and, if by an examination of the records the location of that subdivision could have been ascertained, the identification of the property would have been easy. In *Drexel v. Richards*, 48 Neb. 732, in considering the statute providing for the filing of a lien, we said: "Such

statute requires that in the affidavit filed to procure the lien there should be such a description of the real estate as, aided by extrinsic evidence suggested by the description itself, would charge a party dealing with the real estate with notice of the lien claimed against it." The plaintiff and the stone company were the parties dealing with this real estate. The plaintiff knew when it made its loan that the building was in course of construction, and was charged with knowledge of the fact that the material company was furnishing material therefor. The stone company obtained its judgments after the material company had commenced furnishing the material and while it was still continuing to furnish the same. It likewise was charged with notice of the material company's rights. Being charged with this knowledge, and knowing that the property upon which they were asserting liens was lot 2, block 1, in the Replat of Sewall's Subdivision, they could not have been misled by the fact that the description given in the affidavit attached to the material company's lien did not state that Sewall's subdivision was in the city of Lincoln. The protection provided for laborers and material men by the beneficial statute enacted for their benefit cannot be taken from them on so slender a technicality. We have not overlooked the authorities cited in the briefs of the plaintiff and defendant stone company. We have examined them and find nothing therein which conflicts with what we have above held.

The judgment of the district court is reversed and the cause remanded, with directions to establish the lien of the defendant Nebraska Material Company as a first lien upon the premises in controversy.

REVERSED.

BARNES, LETTON and ROSE, JJ., not sitting.

MARIE HURST, ADMINISTRATRIX, APPELLANT, v. HAYDEN BROTHERS ET AL., APPELLEES.

FILED DECEMBER 4, 1913. No. 17,405.

1. **Partnership, Evidence of.** Evidence examined and set out in the opinion *held* insufficient to show a partnership between the defendants.
2. **Negligence, Evidence of.** Evidence examined and set out in the opinion *held* insufficient to establish actionable negligence against either of the defendants.

APPEAL from the district court for Douglas county:
WILLIAM A. REDICK, JUDGE. *Affirmed.*

Weaver & Giller, for appellant.

Greene, Breckenridge, Gurley & Woodrough, John M. Macfarland, Charles E. Foster and A. J. Kinnersley, contra.

FAWCETT, J.

Plaintiff, as administratrix of the estate of Thomas Hurst, deceased, brought suit in the district court for Douglas county, against Hayden Brothers, a corporation, and Martin Reum, an individual, to recover damages by reason of the death of her husband, as the result of alleged negligence of the defendants. From a directed verdict in favor of the defendants and a judgment thereon, plaintiff appeals.

The petition alleges that Hayden Brothers Company operated a large retail department store in the city of Omaha; that the meat department in its store is managed and operated by defendant Reum; that there exists between the defendants "some sort of a partnership agreement as to the profits arising from said meat department; that Hayden Brothers furnish the room, lights, elevator service, janitor service, and some of the help in said department, and furnish a portion of the advertising for

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said meat department; that Hayden Brothers and said Martin Reum each receive a portion of the receipts from said meat department and are partners in said business." It is then alleged that the decedent during his lifetime was an employee of defendants in the meat department as a salesman; that in the course of his employment as such salesman it became necessary for him to enter a room, belonging to the defendant Hayden Brothers, and adjoining the general salesroom of the meat department, for the purpose of replenishing his stock of supplies; that the room referred to is a narrow room about 30 or 40 feet long and 10 or 12 feet wide, and is supplied with only one light of a very small candle power; that, while so engaged, the decedent "stepped upon a nail which was sticking up through a board, which said board had been previously removed from some of the boxes of supplies, and the nail thus stepped upon by said Hurst penetrated his foot, causing tetanus, and death resulted therefrom a few days thereafter;" that defendants and each of them were negligent, in failing to provide decedent a safe place in which to perform his work; in failing to provide a room or place where refuse boards and other refuse matter could be kept separately from the supply-room; in failing to have the nails removed from the boards as they were taken from the boxes; in failing to furnish sufficient light for the supply-room where the employees were compelled to go to get supplies; in failing to keep the room properly lighted so that employees could see where they were stepping when getting supplies; and in failing to keep the supply-room in a reasonably safe and clean condition; that, by reason of the negligence of each of the defendants, decedent received the injuries which caused his death. The defendants each answered separately with a general denial.

The legality of a partnership between a corporation and an individual, such as is set out in this case, may well be questioned. We think the rule is quite well settled that, in the absence of express power in its charter, a corporation has no authority to enter into a partnership with a

natural person. 1 *Morawetz, Private Corporations* (2d ed.) sec. 421; *Gunn v. Central Railroad*, 74 Ga. 509; *Central R. & Banking Co. v. Smith*, 76 Ala. 572; *Whittenton Mills v. Upton*, 10 Gray (Mass.) 582, 598; *Sabine Tram Co. v. Bancroft & Sons*, 16 Tex. Civ. App. 170. We deem it, however, unnecessary to decide this point, for the reason that the judgment below must be affirmed upon the merits.

There is no conflict in the evidence. The contract between Hayden Brothers Company and defendant Reum was in writing and is set out in full in the abstract. An examination of it shows that the corporation had no interest whatever in the profits and was in no manner liable for any of the losses sustained by Reum in the conduct of his meat business. It shows that the corporation leased to Reum certain space in its building in which to conduct his meat market, which space included the room where decedent received his injury. In addition to the space furnished, the company was to furnish light and heat. As a consideration for these concessions, Reum was to pay the company 7 per cent. of the gross receipts of his business, and was to expend a sum equal to 2 per cent. of his gross sales in advertising his department. The company furnished two cashiers for the department, with cash registers. All the moneys taken in were turned over to these cashiers. At the close of business each day Reum would read the machines, and the cashier would then take the money and turn it over to the company. From the money thus received the company would deduct its 7 per cent., and pay the balance over to Reum whenever he demanded it, which could be every day, but was usually two or three times a week. Reum bought his own stock and paid for it himself. He kept his own bank account, hired all his help, and paid them their salaries. Reum had 2 delivery wagons and the company had 15 or 20. All were lettered "Hayden Brothers." The two wagons owned by Reum were used for hauling his invoices from the depot to the store and for delivering down-town sales, while his sales in the

outlying portions of the city were delivered in the company's wagons. The advertising matter in the newspapers read: "Hayden Brothers Meat Department, Martin Reum, Manager." These advertisements did not always appear in connection with Hayden Brothers' general advertisements, but often appeared in some other place in the newspaper, and, so far as the evidence shows, they were paid for by Mr. Reum, probably out of the 2 per cent. of gross sales required of him by his contract. We see nothing in any of these facts to established a partnership between Hayden Brothers Company and Mr. Reum. The contract between them amounted to nothing more than the renting of floor space to Reum by the company for a rental of 7 per cent. of his gross sales. This was a fixed and certain rental, in no manner dependent upon the question of whether Reum was conducting the business at a profit or a loss. We therefore hold that no partnership is shown.

There is nothing in the evidence to show that Hayden Brothers Company had or attempted to exercise any control of the storeroom where the accident occurred. This room opened off from the meat salesroom, separated by a partition which extended from the floor to within a few feet of the ceiling. Incoming stock was received and unpacked in this storeroom. The work of unpacking was done by the employees of the meat department, of which decedent was one. When the boxes and barrels were opened, the boards were not at once removed, nor were they piled up with any care by the men. They were allowed to accumulate for days at a time, and sometimes would so obstruct the room that the men, including the decedent, would go out and have a partial cleaning up. The sausage grinding was done in this room. The employees of the salesroom also used the room as a cloak-room. When the noon hour arrived on the day of the injury, decedent went into the room to lay off his meat-cutting clothes and put on his street clothes, in order to go to his noonday meal. While crossing the room to where his garments were, he stepped upon a nail protruding from

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a board, and received the injury, set out in the petition, from which he died.

When plaintiff rested, separate motions were made by the defendant company and defendant Reum to direct a verdict in their favor for various reasons, one of which was that there was no evidence to show actionable negligence against the defendants. The district court properly sustained the motions. We are unable to discover any theory upon which a verdict for the plaintiff could have been sustained.

The judgment is therefore

AFFIRMED.

BARNES, LETTON and SEDGWICK, JJ., not sitting.

WILLIAM D. WAY V. JOSEPH J. CAMERON ET AL., APPELLANTS; F. C. PHILLIPS COMPANY, APPELLEE.

FILED DECEMBER 4, 1913. No. 17,411.

1. **Mechanics' Liens: NOTICE: SURPLUSAGE.** A recital in a notice of a mechanic's lien, filed by a subcontractor, that the materials furnished were furnished for the owner of the property under a contract, is an unnecessary recital and will be treated as surplusage.
2. ———: **DESCRIPTION OF PROPERTY.** "In an affidavit for a mechanic's lien, if there appear enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, it will be sufficient." *Guion v. Ryckman*, 77 Neb. 833.
3. **Mechanics' Lien Law: CONSTRUCTION.** The object of the mechanics' lien law being to secure the claim of those who have contributed to the erection of a building, it should receive the most liberal construction to give full effect to its provisions.

APPEAL from the district court for Lancaster county:
WILLARD E. STEWART, JUDGE. *Affirmed.*

T. J. Doyle and G. L. De Lacy, for appellants.

Charles S. Roe, *contra*.

FAWCETT, J.

This suit was originally commenced in the district court for Lancaster county by one William D. Way against Otto D. and Minnie Helming, owners of the property in controversy, Joseph J. Cameron, the contractor who erected a dwelling-house on the property, and various subcontractors and materialmen, including F. C. Phillips Company, a subcontractor, to foreclose a mechanic's lien on lots 11 and 12, block 25, Dawson's addition to South Lincoln, Nebraska. At the time of the trial all of the mechanics' liens except those of F. C. Phillips Company had been paid or discharged of record, including that of the plaintiff Way. The case proceeded to trial upon the cross-petition of F. C. Phillips Company, whom we will style plaintiff, against the Helmings, whom we will style defendants, and the property above described. There was a decree for plaintiff, and defendants appeal.

The first contention of defendants is that the lien filed by plaintiff "was insufficient in law to give a lien against the property." The lien filed was as follows: "Lincoln, Nebraska, Apr. 29, 1910. O. D. Helming, Esq., to F. C. Phillips Co. Dr." Here follow items constituting plaintiff's claim. The affidavit attached recites: "G. H. Giesler being first duly sworn on his oath says that the foregoing itemized account of work, labor, skill, and materials, is a true and correct account of the work, labor, skill, and materials done and performed and furnished by this affiant for the said O. D. Helming under a contract for installation of plumbing on the following described lot, piece, or parcel of land, viz.: Lots 11 & 12, block 25, between 10th & 11th and Pine & Rose street. And this affiant further says that he has, and hereby claims, a lien on the said premises for the amount of his said account, to wit: The sum of \$275, together with interest thereon

at the rate of 7 per cent. per annum from the twenty-ninth day of April, A. D. 1910, and further affiant says not. F. C. Phillips Co., by G. H. Giesler, Sec'y. Subscribed in my presence and sworn to before me this 29 day of April, A. D. 1910. John Giesler, Notary Public. (Seal.)"

It is said in the argument that the contractor's name is not mentioned, and that the statement claims a contract with O. D. Helming, the owner of the property; and it is argued that plaintiff had in fact filed a claim under section 7100, Ann. St. 1911, and was attempting to foreclose under section 7101. The fact that plaintiff in the notice of lien filed entitled it "O. D. Helming, Esq., to F. C. Phillips Co. Dr.," and that in the affidavit attached to such notice it is said that the materials were furnished "for the said O. D. Helming under a contract," is insufficient to destroy the force of the paper as a lien. As early as *Marrener v. Parton*, 17 Neb. 634, we said: "We have no doubt that in a proper case, one furnishing materials in good faith for the erection of a building under an agreement with a contractor for that purpose, may file a mechanic's lien upon the structure and the lots on which it stands. The lien is given, however, not upon the ground that a contract was made by the owner with such subcontractor, but because the material so furnished was used in the erection of the building. The furnishing of the material is notice to the owner of the rights of the party, and until the time for filing a lien has expired, he is directly liable to such party for the value of the same." In *Garlicks v. Donnelly*, 42 Neb. 57, we held: "It is not necessary to the sworn statement and claim of lien required to be filed by subcontractors that there should be attached thereto a copy of the written contract under the terms of which the rights of such subcontractor have accrued; neither is it necessary that the ownership of the property benefited should be set forth therein." The recital in the notice of lien, that the materials furnished were "for the said O. D. Helming under a contract," was an unnecessary recital and should be treated as mere surplusage.

It is further said that the description of the property in the lien was not sufficient. The description in the affidavit attached to the notice of lien gives the property as "Lots 11 & 12, block 25, between 10th & 11th and Pine & Rose street." The technically correct description of the property is lots 11 and 12, in block 25, Dawson's addition to South Lincoln. The building erected was at the north-west corner of Eleventh and Rose streets. This description, together with the fact that, at the time plaintiff furnished the plumbing, fixtures and material, Mr. and Mrs. Helming both went to plaintiff's place of business and looked at the fixtures, decided what they wanted and made changes, and that the extras were selected by Mrs. Helming, shows very clearly that defendants were in no manner misled by the description given in the notice. In *Guiou v. Ryckman*, 77 Neb. 833, we held: "In an affidavit for a mechanic's lien, if there appear enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, it will be sufficient." We think the description of the property in the notice of lien was sufficient.

We deem it unnecessary to pursue the matter further. The defenses sought to be interposed are too technical to be permitted to prevail. In *Rogers v. Omaha Hotel Co.*, 4 Neb. 54, speaking through Mr. Justice MAXWELL, it is said: "The object of the law under consideration being to secure the claim of those who have contributed to the erection of a building, it should receive the most liberal construction to give full effect to its provisions." This language is quoted with approval in *Henry & Coatsworth Co. v. Fisherick*, 37 Neb. 207, 221.

The judgment of the district court is

AFFIRMED.

• BARNES, LETTON and ROSE, JJ., not sitting.

EGBERT H. EVERIST, APPELLEE, v. MANGELSDORF BROTHERS
COMPANY, APPELLANT.

FILED DECEMBER 4, 1913. No. 17,422.

Brokers: ACTION FOR COMMISSION: REVIEW. Record examined, and held free from any prejudicial error.

APPEAL from the district court for Red Willow county: .
ROBERT C. ORR, JUDGE. *Affirmed.*

C. E. Eldred, for appellant.

W. S. Morlan, *contra*.

FAWCETT, J.

Plaintiff brought suit in the district court for Red Willow county, for \$210.23, claimed to have been earned as commission in purchasing alfalfa seed for defendant. Verdict and judgment for plaintiff. Defendant appeals.

The answer admits a balance due, in the sum alleged, but as a defense to the action alleges that plaintiff is not the real party in interest; that defendant's contract was with the firm of Relph & Everist, of which firm plaintiff is a member, and also alleges that plaintiff included in one car of seed 25,550 pounds claimed to have been purchased from his copartner Relph, and for which he claimed to have paid \$8 per bushel, when the same was worth not to exceed \$7.20 per bushel, for the reason that the seed had not been properly cleaned and therefore contained 14 per cent. of chaff and other foreign matter, to defendant's damage in the sum of \$338.40, which it was alleged left a balance due from plaintiff to defendant of \$128.35. The reply was a general denial.

Upon the trial plaintiff took the stand in his own behalf, and testified substantially that the contract was with him individually; that his partner Relph had no interest in the contract and took no part in the performance of the

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service. Defendant offered no evidence to controvert plaintiff's testimony, but contends that because plaintiff on cross-examination admitted that in buying the alfalfa seed for defendant he used the firm money, that he deposited the drafts received from time to time from defendant, aggregating something over \$10,000, to the credit of the firm in the latter's bank, and also turned over to the firm his commission earned in the purchase of the seed, it necessarily follows that the transaction was a firm transaction. We think it is immaterial what money plaintiff used in paying for the alfalfa seed, or what he did with the commission which he earned in representing defendant. The question is, was he acting individually for the defendant? The uncontradicted evidence of the plaintiff is that, when defendant's representative called upon him, he said he wanted to get a man in that locality to buy alfalfa seed; that plaintiff expressed a willingness to represent him in that capacity; that before making the contract plaintiff and defendant's representative drove into the country on two different occasions and examined alfalfa seed at different places, at which times defendant's representative had plaintiff examine the seed and pass his judgment upon it, so as to demonstrate whether or not he knew good seed from poor and what amount of dirt and foreign matter would actually be in the seed; that after applying this test he said he thought plaintiff's judgment was fairly good, and thereupon engaged plaintiff to represent defendant in purchasing two car-loads of seed. The district court fairly submitted to the jury the question as to the relationship of the parties; that is to say, as to whether or not defendant contracted with plaintiff individually or with the firm of Relph & Everist, and the evidence sustains the verdict upon that point.

Defendant objects to instruction No. 5½. We have examined this instruction carefully and are unable to find any error in it. Defendant also urges that the court erred in giving instruction No. 7. We are not prepared to say that instruction No. 7 is free from error, but if it is in

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any respect erroneous the error is against plaintiff, and not defendant. It is next urged that the court erred in refusing to give instruction No. 4, requested by defendant. The concluding paragraph of this instruction is: "You are instructed that, under such circumstances, the plaintiff being an agent of the defendant, would have to exercise absolute good faith and should be held strictly accountable to defendant for all of his acts in connection with the purchase of said alfalfa seed from his partner, T. J. Relph. for defendant, and that all his acts connected therewith should be subjected to the strictest scrutiny, and he is liable to the defendant for any negligence or carelessness on his part in the inspection and purchase of said alfalfa seed." The objection to this instruction is, there is no evidence in the record to sustain the allegations of defendant's answer that plaintiff was guilty of any negligence or carelessness in the inspection and purchase of seed from Relph. Had the allegations of defendant's answer been sustained by proof, then defendant's objection upon this point would probably have been good. It may be that defendant had a valid counterclaim against plaintiff, as alleged in the answer, but there is no proof of that fact.

Finding no prejudicial error in the record, the judgment of the district court is

AFFIRMED.

BARNES, ROSE and SEDGWICK, JJ., not sitting.

LILLIAN M. MAUL, APPELLEE, v. RAYMOND V. COLE ET AL.,
APPELLANTS.

FILED DECEMBER 4, 1913. No. 17,392.

1. Principal and Agent: FRAUD OF AGENT: ACTION: DEFENSES. One who undertakes to act as agent of another for the sale or exchange of real estate cannot defend, in an action for damages caused by

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his fraud in such employment, on the ground that his contract of agency was void because not in writing, as required by section 74, ch. 73, Comp. St. 1911. The fact that such contract is voidable will not protect the parties thereto in perpetrating fraud upon each other.

2. ———: ———: ———: ———. If the agent receives an offer of exchange which would be advantageous and desired by his principal, and fraudulently conceals the offer and misrepresents it to his principal as being much less favorable than it in fact was, and so prevents an exchange to the damage of his principal, and a tenant of the principal holding an outstanding lease which would prevent the exchange without the consent of the tenant has agreed orally with the principal to transfer the lease to the property taken in exchange, if such exchange can be made, the agent cannot defend against the action of this principal for damages caused by the fraud of the agent on the ground that the agreement of the tenant to make such transfer was not in writing and was therefore voidable. The fact that the agent has such influence with the tenant that he could induce the tenant to avoid his oral agreement is no defense, in the absence of any other motive on the part of the tenant than to assist the agent in perpetrating the fraud upon his principal.

APPEAL from the district court for Douglas county:
ABRAHAM L. SUTTON, JUDGE. *Affirmed.*

Brome, Ellick & Brome and W. C. Fraser, for appellants.

Hugh A. Myers and Charles Battelle, contra.

SEDGWICK, J.

In June, 1911, plaintiff was the owner of lot 7, block 108, in the city of Omaha, and the McCague Investment Company proposed to exchange lot 6 therefor, its purpose being to secure the erection of a large hotel building on lots 7 and 8. The plaintiff informed the investment company that the defendant McKay was authorized to act for her in the matter, and the investment company then made a formal proposition of exchange, and offered \$40,000 as a cash difference between the two lots, less a commission of \$1,000. The exchange was not effected, and afterwards

the plaintiff brought this action in the district court for Douglas county, alleging in her petition that she employed the defendant McKay as her agent to attend to the business for her; that the defendants were special partners in the business; and that when the defendants received the above proposition they fraudulently concealed the same from her and represented to her that the investment company had offered \$8,000 difference in the proposed exchange, and because of the fraud of defendants she lost the bargain which she might have made. The trial resulted in a verdict and judgment for plaintiff, and the defendants have appealed.

The foregoing statement of the details of the issues is sufficient for an understanding of the two grounds urged for reversal of the judgment in the brief of defendants.

1. The first contention is that, as the employment of these defendants as agents of the plaintiff was not in writing, the contract was void under section 74, ch. 73, Comp. St. 1911, and it is said: "She is suing them because she says they did not properly perform the duties of their contract of employment, and the basis of her action is, and of necessity must be, a valid contract of employment for a breach of the conditions of which she may invoke the aid of the court." We do not think that this action depends upon the validity of the contract of employment of the defendants as agents of the plaintiff. They undertook to act as her agents with her consent, and in that capacity received a proposition for her which she had a right to know and would have been to her advantage if known to her, and they fraudulently concealed it from her to her damage. The statute above cited was intended to shield landowners from fraudulent claims of commission of agents. Such contracts as the one in question, if not in writing, are voidable and cannot be enforced by either party, but the parties are not prohibited from acting upon them if they desire to do so, and if they act upon them they must act fairly. The fact that the contract is voidable will not protect the parties thereto in perpetrating fraud upon each other.

2. The Cole-McKay Company, a corporation of which these defendants were two principal officers, has a valid lease and possession of lot 7. There was evidence that the defendants, as officers of the corporation, had agreed orally that if the exchange was made the building on lot 7 should be removed to lot 6 and the corporation would accept a transfer of its lease accordingly. The remaining ground for reversal urged in defendants' brief is that the agreement to release the right of the company to use lot 7 under its lease and accept the use of lot 6 in lieu thereof was void because not in writing, and therefore the plaintiff could not comply with the proposition of the McCague Investment company, and so was not damaged by the defendants' action. It will be observed that the lease of lot 7 was owned by the corporation, and while these defendants were two of the principal officers of the corporation they are here sued as individuals, and as such they are not to be considered as the corporation. The plaintiff's agreement with the corporation provided that the expenses of removal, and any other loss that the corporation might suffer, should be reimbursed by the plaintiff. The contract was a fair one so far as the interests of the corporation were involved. It was not void as being *malum in se*. If the plaintiff could consummate the exchange of so much advantage to her, it would be a gross breach of faith on the part of the corporation to refuse to perform its agreement and wantonly cause great loss to the plaintiff. These defendants surely are not in a position to assert that the corporation would refuse to perform its contract for the sole purpose of enabling them to avoid liability for their misconduct. If the plaintiff could have made the exchange, but for the fraud of the defendants, she was entitled to recover her damages caused by that fraud. *Rice v. Manley*, 66 N. Y. 82; *Jackson v. Stanfield*, 137 Ind. 592. The evidence is that plaintiff could have made the exchange, and these defendants are not in a position to assert that she could not. If this point is to be controlled by technicalities, it might be said that the defendants, not being

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parties to the agreement to exchange the lease to lot 6, cannot defend upon the supposition that the parties to that agreement will avail themselves of the statute of frauds to enable them to violate it. *Rickards v. Cunningham*, 10 Neb. 417; *Cresswell v. McCaig*, 11 Neb. 222.

Neither of the points urged by defendants requires a reversal, and the judgment of the district court is

AFFIRMED.

BARNES, LETTON and ROSE, JJ., not sitting.

THADDEUS I. C. PEMBERTON, APPELLANT, v. EUNICE PERRIN
ET AL., APPELLEES.

FILED DECEMBER 4, 1913. No. 17,449.

1. **Parent and Child: AGREEMENT FOR ADOPTION.** An agreement to adopt a child "as our own, and * * * provide for, educate and rear him accordingly," may, if upon a sufficient consideration, be construed, in a contest between such child and other heirs, to make such child an heir, but it could not prevent a free disposal of the property by deed or will as the owners thereof might see fit.
2. **Wills: IDENTIFICATION OF DEVISEE.** A will describing the devisee as "my nephew John Conrod, of Coldwater, Michigan," sufficiently identifies John Conrod Swart, who resided at Coldwater, Michigan, at the time the will was made, and was the only nephew of the testatrix residing there.
3. ———: **DESCRIPTION OF DEVISE: PAROL EVIDENCE.** If a will describes the land devised as "the northwest quarter of the northeast quarter (N. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$) of section eight (8), township seventeen (17), range nine (9) east, in Washington county, Nebraska," it may be shown by parol evidence that the testatrix owned 40 acres of land in range 10, otherwise described as in the will, and owned no other land, and that the intention was to devise the land owned by testatrix, and that it was described as in range 9, instead of range 10, by mistake.
4. ———: ———: **MISTAKE: PLEADING AND PROOF.** The allegation that the mistake of inserting 9 instead of 10 as the number of the range was the mistake of the scrivener who wrote the will is sustained

by proof that the mistake of the scrivener in inserting the wrong number of the range was induced by an oversight or ignorance of the testatrix as to the true number of the range.

APPEAL from the district court for Washington county:
GEORGE A. DAY, JUDGE. *Affirmed.*

F. Dolezal, for appellant.

W. S. Cook, J. C. Cook and Herman Aye, contra.

SEDGWICK, J.

In 1863 George Pemberton and Margaret A. Pemberton, his wife, made a contract in writing with Kate A. Griffith, the mother of this plaintiff, by which they agreed to adopt the plaintiff, who was then about two years of age. After the death of Mr. and Mrs. Pemberton the plaintiff brought this action to establish and quiet title in and to 40 acres of land which Mrs. Pemberton owned at the time of her decease. The plaintiff claimed this land by virtue of the contract of adoption. The defendant derived his claim through the will of Mrs. Pemberton. The district court for Washington county found the issues in favor of the defendant and dismissed the plaintiff's case. The plaintiff has appealed.

No legal adoption of plaintiff was ever made, but the contract with the mother provided that Mr. and Mrs. Pemberton should take the child into their custody and "adopt him as our own, and will hereafter provide for, educate and rear him accordingly. And we do further agree to clothe, educate and in every way provide for said child in a suitable condition and according to our pecuniary and social standing," and other similar agreements. The plaintiff relies apparently upon the following provisions in the said contract: "We do further agree that at our death the said child shall be an equal heir to his portion of our estate the same as our own children, it being the express understanding that we are to treat, control and in every way provide for said child as our own, we

having hereby adopted it as such, and it is mutually agreed that from this date said child shall be known and called by name 'Charles Pemberton.'"

Mr. and Mrs. Pemberton had no children at that time, and the plaintiff insists that the contract must be considered as an irrevocable agreement, upon a valuable consideration, to leave to him whatever property they might have at the time of their decease. There might be ground for contending that this contract could be enforced as an agreement to make the plaintiff an heir of the deceased under the former decisions of this court, but there appears to be no ground for the contention that this agreement gave the plaintiff such an interest in the property that Mr. and Mrs. Pemberton then had or might thereafter acquire that they could not freely dispose of the same by deed or will as they saw fit.

A short time before her death Mrs. Pemberton made a will whereby she devised to "my nephew John Conrod, of Coldwater, Michigan, the northwest quarter of the northeast quarter (N. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$) of section eight (8), township seventeen (17), range nine (9) east, in Washington county, Nebraska, in fee simple." When the will was offered for probate in the county court of Washington county it was contested, and afterwards upon appeal to the district court for that county it was found to be the last will of Margaret A. Pemberton, and judgment was entered accordingly. It is objected that this will does not convey title to John Conrod Swart. The objection that he is not described in the will by his full name is, of course, without merit. The oral evidence at the trial shows that the testatrix had no other nephew named John Conrod and residing at Coldwater, Michigan, and fully identifies the defendant as the person intended as the devisee in the will.

It is also objected that the will describes the land devised as in range 9, whereas the plaintiff claims a 40 acres in range 10, which the evidence shows was owned by Mrs. Pemberton at her death. The description of the land in

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the will is complete and accurate except as to the range. The answer alleges that the testatrix owned 40 acres in range 10, but had no land in range 9, and no other land than the 40 acres in range 10; that that forty was the one intended by the testatrix, but range 9 was inserted in the will, instead of range 10, by mistake of the scrivener who wrote the will. It is conceded that evidence supports all of these allegations, except the allegation that the mistake was made by the scrivener. It appears to be contended that evidence that the testatrix intended the land in range 10, but made a mistake as to the number of the range, is incompetent under the allegation that the wrong number was inserted by mistake of the scrivener; that allegation and proof must agree, and that this evidence is such a departure from the allegations of the answer that it must be disregarded. This is altogether too fine a distinction for modern jurisprudence. If the scrivener inserted in the will the wrong number of the range in which the land intended was situated, he made a mistake, even though that mistake was induced by the oversight of the testatrix, and evidence that he inserted the wrong number because the testatrix erred in the directions given him was competent under the allegations of the answer.

We have found no error in the record requiring a reversal, and the judgment of the district court is

AFFIRMED.

LETON, FAWCETT and HAMER, JJ., not sitting.

CATHERINE TIEHEN, ADMINISTRATRIX, APPELLEE, v. NETTIE M. CORNELL, APPELLANT; FARMERS BANK OF PRAIRIE HOME, APPELLEE.

FILED DECEMBER 24, 1913. No. 17,976.

APPEAL from the district court for Richardson county:
JOHN B. RAPER, JUDGE. *Appeal dismissed.*

Lincoln Stone & Supply Co. v. Ludwig.

E. Falloon and Burkett, Wilson & Brown, for appellant.

John C. Mullen and C. S. Polk, contra.

PER CURIAM.

This is a motion to dismiss an appeal from an order confirming a judicial sale, for the reason that the appeal is without merit and frivolous. No defense was made to the foreclosure of the mortgage and no objections were made to the appraisement before the sale, but objections were thereafter filed to the confirmation. A number of affidavits were used at the hearing, but none of them have been preserved in a bill of exceptions. Six objections are made to the confirmation. The first, second, third and fifth are to the appraisal, and were waived by reason of not being filed before the sale. The fourth objection is that the notice was published in a paper dated July 24, and the paper was not placed in the mail until July 27. The sixth objection is that the sheriff had not taken or received, at the time of the sale, the cash for which the land was sold. There is no proof of either of these facts in the record.

The motion to dismiss the appeal is

SUSTAINED.

LINCOLN STONE & SUPPLY COMPANY, APPELLANT, V. MAUDE
M. LUDWIG ET AL., APPELLEES.

FILED DECEMBER 24, 1913. No. 17,423.

1. **Contracts: BUILDING CONTRACT: ACTION FOR PRICE: COUNTERCLAIM.**

Where a party contracts with another to build him a dwelling-house, and to that end furnishes the plans and specifications therefor, a claim that the work was done according to the plans and specifications is not available as a defense to a counterclaim or set-off for damages for a defective construction of the building.

2. ———: ———: **BREACH: MEASURE OF DAMAGES. In an action for**

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breach of a building contract for alleged improper construction, the owner's measure of damages is the difference between the value of the building when constructed and what its value would have been if constructed according to contract, and with reasonably sound material and reasonably skilful workmanship.

3. Evidence examined, its substance stated in the opinion, and held sufficient to sustain the judgment of the trial court.

APPEAL from the district court for Lancaster county:
WILLARD E. STEWART, JUDGE. *Affirmed.*

C. S. Polk, for appellant.

S. L. Geisthardt, contra.

BARNES, J.

This was an action in the district court for Lancaster county to foreclose a mechanic's lien for the sum of \$417.14, alleged to be due the plaintiff on a contract for the erection of a dwelling-house for the defendants. By the terms of the contract defendants were to pay plaintiff the sum of \$3,000 for the completion of the work. It was alleged that defendants had only paid plaintiff the sum of \$2,610, and had failed to pay the balance of \$390, although often requested so to do.

It appears that plaintiff had duly perfected its mechanic's lien on the premises, and that fact was not denied. The defendants, by their answer, claimed \$2,000 damages for a breach of the plaintiff's contract in failing to properly construct the house in question. The defendant's allegations were denied by the plaintiff's reply. The cause was tried to the court without the intervention of a jury, and after the evidence was concluded, by the request of both parties, the presiding judge viewed the premises. The court found that the plaintiff had failed to construct the building according to the specifications contained in the written contract, and awarded the owner, Maude M. Ludwig, a judgment for \$1,000, and canceled the plaintiff's lien. The plaintiff has appealed, and now contends

that there was no competent evidence of any proper measure of damages.

The testimony clearly shows that the construction was in many respects defective, and that plaintiff had failed to comply with the terms of his contract. One of the defendants' witnesses was a Mr. Tyler of this city, who is an architect and builder of many years' experience. He testified as to the condition of the building, and by his evidence it appears that there were two cracks in the east wall, one over the kitchen door and one over the French window; that there was also a crack in the angle of the projection on the north side of the house. He gave the length of those cracks in detail, showing the separating of the walls and the cracks in the plastering. He also testified that there were stains on the plaster from water that had come through the cement blocks, of which the house was constructed. He estimated the north wall as being from three to three and one-half inches out of plumb. He said that the other walls were out a little. He condemned the flat roof; but it appears that the roof was constructed in accordance with the specifications. The witness considered that the cement blocks were a fair average lot, but testified that they were not properly laid in the construction. He also testified that the floors had settled and were sloping; and also described many other defects in the construction.

The defendant Walter Ludwig testified as to the manner and method of construction, and claimed that he had repeatedly called the plaintiff's attention to matters that were unsatisfactory to him, but could get its foreman to pay no attention to them. He described the condition of the house shortly after it was completed, and gave evidence of its defective condition. He also testified that the specifications and plans were made by Mr. Lahrack, who was the plaintiff's foreman. He showed that the building was left in a defective condition; that the blocks were poorly laid; and he testified that you could see daylight anywhere in the house through the blocks; that the joints were not

properly filled; that many of the blocks were cracked; that the specifications called for wire lath to keep the corners from cracking, and no such wire lath was used; that the outer walls are bulging out, and that the east wall will eventually fall down; that the north wall is three inches out of plumb; that there is not a square joint in the corners of the building; that the mantel has fallen down and is thrown out into the alley; that the stones are so cracked that when it rains the wind drives the moisture in across the floor; that it rains through on the north and east side of the house, and that the day after the house was turned over to the defendants it rained in so that it had to be wiped up from the floor. He also testified that he could turn the hose on the side of the house and in five minutes the water would be in on the floor; that the interior is mouldy, and the plastering is turning yellow and green, and the porch is falling away from the house, and the joints are all poor; that on the east side of the house the pointing is all crumbling, and on the south side it is practically gone; that the floors are not even in any part of the house, and you cannot set a chair or table down without its rocking; that there are cracks in the wall of over a half of an inch; that the plastering is cracked, and on the east side one can see clear through the wall; that the house has settled so that you cannot lock the doors; that the upstairs is divided into three rooms, a large room running east and west, and a bedroom; that you can stand in this bedroom and see the sky through the cracks in the east wall. This testimony was corroborated in part by the witness Tyler, by one G. J. McDougal, who was a carpenter and contractor who did work on the house, and T. P. Harrison, who was also a contractor and had been in the business for some 26 years.

On the measure of damages, Charles T. Knapp testified that he was in the real estate business, and had lived in Lincoln for nine years; that he was well acquainted with the value of buildings and property in this city; that he was acquainted with the Ludwig house, and had examined

it inside and out; that he was acquainted with the value of buildings and property in this locality, and the building as built is in a dilapidated condition. The floor had evidently sunk away from the partitions; there were a good many cracks in the sides of the house and in the plastering and walls, and that you could see daylight "clean through." Two of the walls were somewhat out of plumb, and the mortar had washed out of the east wall to some extent; that one of the mantels had fallen down and had practically fallen to pieces; that there were cracks in the cement floor, and the window and door casings were all loose; that the condition of the house would impair its market value; that the depreciation in value, compared with what it would have been worth if built in a substantial condition, would be fully \$2,000; that to make a good job the house would have to be torn down and rebuilt.

E. P. Hovey testified that he was engaged in the insurance and real estate business, and had been for 15 years, in the city of Lincoln; that he was acquainted with the value of real estate in this city during all of that time. He said: "I have examined the Ludwig property in controversy, both inside and out. I examined it for the purpose of ascertaining its value. The walls seem to be settled or fallen away so that there was a large crack so that you could see daylight; also discolored walls indicating that the water came through. * * * Am acquainted with the value of property in this locality, and was two years ago. * * * If the building was in the same condition two years ago as now I would say that it was only worth one-half price. If the house had been properly constructed it would be worth not far from \$5,000; I certainly would not give more than \$2,500 for it when I saw it."

As opposed to this testimony, the plaintiff claimed that it had constructed the house in question according to the plans and specifications. It developed, however, in the testimony that plaintiff, by its foreman, Lahrack, fur-

nished the plans and specifications on which the house was built, and therefore this defense is unavailable. Lah-rack testified that he had not examined the interior of the house since the fall it was completed; that he observed at that time that the floor joists had been cut in order to install a heating plant, and that would cause the outside walls to bulge; that the original plans for the building were two feet larger each way, and the floor joists were to be 2 by 10; that afterwards they changed the plans so as to make the house two feet smaller and reduce the cost to \$3,000, and that the floor joists used in the construction were then 2 by 8, instead of 2 by 10. His testimony described the manner of the construction, and he claimed that the bulging of the walls and cracks were caused by the settling of the partitions and cutting the joists; that if wire lath was used and the partition did settle, instead of breaking small cracks in the angle it would have opened as far as the lath extended and the plastering would have fallen off. The material for pointing a house is Portland cement and fine sand; that white cement sets too fast to be easily worked; that the porch which is falling away is not provided for in the specifications. His testimony was supported to a certain extent by the testimony of H. S. Allsbrow and Samuel Vincent, who was the foreman who had charge of the work when the house was constructed. The defendants' witnesses all testified that they saw no joists cut for installing the heating plant.

It will thus be seen that there was a sharp conflict in the testimony as to the manner of the construction of the house, and the condition in which it was left when completed. It was provided by the terms of the contract that in case of any disagreement between the owner and the contractor as to any of the provisions of the contract or of the plans or specifications, or of any payment thereunder, the disagreement should, at the request of either party, be submitted to the arbitration of three men, each party to select one, and the two to select a third, and the

decision of said board of arbitration should be final; and it was agreed that each party should pay one-half of the expense of such arbitration, regardless of the decision. Defendants alleged that they had offered to arbitrate the question in dispute with the plaintiff, and that plaintiff had declined to take any action in that behalf. It was agreed in the contract that all work and material used in the construction of the house in question should be first class, and the work should be done in a workmanlike manner.

It is evident from a reading of the record that the plaintiff did not comply with the terms of the contract, and that the defendants were entitled to recover a substantial amount of damages therefor.

In *Hartford Mill Co. v. Hartford Tobacco Warehouse Co.*, 121 S. W. (Ky.) 477, it was said: "In an action for breach of a building contract for alleged improper construction, the owner's measure of damages is the difference between the value of the building when constructed and what its value would have been if constructed according to contract, and with reasonably sound material and reasonably skilful workmanship."

In *Small v. Lee & Bros.*, 4 Ga. App. 395, 61 S. E. 831, it was said: "Where a builder has in good faith intended to comply with a contract and has substantially complied with it, although there may be slight defects, caused by a misconstruction of the terms of the contract, and the house as built has been received by the owner, and is reasonably suited for the purposes intended, the contractor may recover the contract price, less the damage on account of such defects. In such case the true measure of damage is the difference between the value of the house as finished and the house as it ought to have been finished under the contract, plans, and specifications." This rule is supported by *Norcross Bros. Co. v. Vose*, 199 Mass. 81; *Fleming v. Lunsford*, 163 Ala. 540, 50 So. 921; *Morton v. Harrison*, 52 N. Y. Super. Ct. 305; *Moulton v. McOwen*, 103 Mass. 587; *Norway Plains Savings Bank v. Moors*, 134 Mass. 129.

From an examination of the authorities, we conclude that the testimony of the defendants' witnesses as to the measure of damages was competent, and was properly received.

Again, it must be remembered that the trial court examined the premises, and thus gained a knowledge of the conditions there existing, which are not available to this court; and, in view of this fact, together with evidence contained in the record, it cannot be said that the evidence fails to support the judgment rendered by the trial court, and it is therefore

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

CLARA E. BATTEY, APPELLEE, v. LOSADA L. BATTEY ET AL.,
APPELLEES; D. A. SHUTER ET AL., APPELLANTS.

FILED DECEMBER 24, 1913. No. 17,451.

1. **Wills: BEQUEST OF MORTGAGEE'S INTEREST IN LAND: EFFECT.** A will which gives to a devisee the use of real estate on which the testator held a mortgage at the time of his death will pass the interest of the mortgagee, as it actually existed, with all of the rights and interests of the debt, and in the land itself growing out of that relation to it. As to such property interest the testator cannot be said to have died intestate.
2. **Executors and Administrators: POWER OF SALE: MORTGAGEE'S INTEREST IN LAND.** An executor, in such case, who is given the power by the terms of the will itself to sell and dispose of such property, having taken title to the land in satisfaction of the mortgage debt, will hold the same as personalty belonging to the estate, and may sell and convey the land to a *bona fide* purchaser without an order of court.
3. ———: ———: ———: **TITLE OF PURCHASER.** In such case the purchaser will take a good title to the land, and subsequent proceedings of the county court in another state cannot divest him of his title.
4. ———; **SETTLEMENT OF ACCOUNTS: ESTOPPEL.** When it appears that

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the executor has settled his accounts with the devisee and the estate of the testator, and has been discharged from his trust relation, the devisee being at all times of full age and responsible for his acts, such devisee will be estopped from claiming any interest in the land so disposed of by the executor.

5. ———: ESTOPPEL. In such case the executor, who is one of the heirs of the testator, is also estopped by his own acts to afterwards claim any interest in the land thus sold and conveyed by him to the purchaser.

APPEAL from the district court for Perkins county:
ROBERT C. ORR, JUDGE. *Reversed with directions.*

Tibbets, Morey & Fuller, for appellants.

W. P. McCreary, J. C. Stevens and B. F. Hastings,
contra.

BARNES, J.

This action was a suit in equity, brought in the district court for Perkins county, to quiet the title to the north half of section 31, township 11, range 39 west, situated in that county, in the plaintiff, and cancel certain deeds, under which the defendants claimed title, as clouds upon the title of the plaintiff.

When the action was commenced, plaintiff confessed defendants' demurrer to her petition, and on the 10th day of April, 1910, she was allowed 90 days in which to file an amended and supplemental petition. When the amended petition was filed, defendants Shuter and Westphalen answered, claiming title by mesne conveyances from one W. L. Rutledge, who purchased the land in question from Galen S. Battey, as executor of the will of Pauline A. Battey, deceased, who conveyed the land to Rutledge in pursuance of his purchase. The other defendants made no appearance, and default was entered against them. There was a reply which put in issue the allegations of the answer. A trial to the court resulted in general findings and a decree for the plaintiff, and the defendants Shuter and Westphalen have appealed.

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The record discloses that one Pauline A. Battey departed this life in Bureau county, Illinois, in the year 1897, leaving surviving her a husband, Owen W. Battey, and Losada L. Battey and Galen S. Battey, her two sons, and sole heirs at law. She also left a will by which it was provided, among other things: "I further devise and bequeath to my son, Losada L. Battey, the use of the following described property, with the provision that the executors of this my last will have the power and are hereby instructed to sell all or any of the property hereinafter described, if it is in their judgment profitable so to do, and invest the proceeds in other desirable property for the benefit of the said Losada L. Battey during his life." (Here follows a description of the property.) It was further provided by the terms of the will as follows: "I also give and bequeath to my son, Losada L. Battey, the use of all the north half ($\frac{1}{2}$) of section thirty-one (31), in township eleven (11) north, of range thirty-nine (39) west, situated in the county of Perkins and state of Nebraska. * * * I nominate and appoint as executors of this my last will and testament, my husband Owen W. Battey and my son Galen S. Battey, without bond." This will was duly probated in the county and state where the testator died, and Owen W. Battey and Galen S. Battey were appointed executors; Galen living at that time in Jewell county, Kansas. Afterwards, Owen becoming disqualified by infirmity, which was soon followed by his death, one Frank J. Nye was appointed administrator *de bonis non*. The bulk of the estate consisted of real estate in Jewell county, Kansas. Galen S. Battey had this will probated in that state, and himself appointed executor according to the nomination of the will. As a step in carrying out the provisions of the will and closing the estate, Galen S. Battey presented the will for probate in the county court of Perkins county, Nebraska, and, after due notice, the same was duly admitted to probate as a foreign will operative upon real estate in that county, and Galen S. Battey was duly appointed executor thereof without bond, according to the provisions of the will.

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It further appears that at the death of the testatrix she was the owner of two notes for \$750 each, secured by a mortgage on the land in Perkins county. Meantime Galen S. Battey, as executor of her estate, had made a settlement with one Cannon, who was at that time the owner of the Perkins county land, had dismissed a foreclosure suit that had been commenced in the lifetime of the testatrix, and had satisfied the mortgage by taking a deed from Cannon to the land in full settlement of the debt due to the estate, which deed was dated August 1, 1898; that in the year 1901 Frank J. Nye was finally discharged as administrator *de bonis non*, and no further proceedings were ever had in the county court of Bureau county, Illinois, until after the commencement of this action. On the 28th day of July, 1902, Galen S. Battey, as executor, sold and conveyed the land in question to one W. L. Rutledge for its then full value, and the defendants Shuter and Westphalen are the *bona fide* grantees of said Rutledge.

It further appears that on April 16, 1902, Losada L. Battey and his wife, Mary L. Battey, conveyed by quitclaim deed to the plaintiff all their interest in and to the land in question, and that by a clerical mistake in writing said deed the land was described as the "north half of section thirty (30), in township eleven (11) north of range thirty-nine (39)," instead of the "north half of section 31," and on the 31st day of October, 1903, said quitclaim deed was recorded in the records of Perkins county, Nebraska; that on the 7th day of May, 1907, Galen S. Battey conveyed to the plaintiff, who is his wife, his interest in said land by a quitclaim deed, and on May 11, 1907, said deed was recorded in the deed records of Perkins county, and it is under the above described quitclaim deeds from the sole heirs of Pauline A. Battey that the plaintiff claims title to the land in question.

It is further disclosed by the record that after the demurrer was confessed, and before the amended and supplemental petition was filed, such proceedings were had

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in the county court of Bureau county, Illinois, that Frank J. Nye was reappointed administrator *de bonis non*, and the executor, Galen S. Battey, went through the form of settling his accounts with the estate of Pauline A. Battey. The settlement was afterwards approved by the county court, and an order was entered distributing the estate, and the administrator Nye was directed to convey the land in question in this suit to the plaintiff by an administrator's deed, which was accordingly done, and Nye was finally discharged as such administrator. Thereupon the proceedings and the deed above mentioned were set up in the amended petition as a part of plaintiff's cause of action.

As we view this case, the last-mentioned proceedings gave the plaintiff no additional right of action other than that possessed by her when her suit was commenced. The appellants contend that the court erred in its findings and judgment for the plaintiff, and that the findings and judgment are contrary to law.

The first question presented for our determination may be stated as follows: Was the will of Pauline A. Battey operative upon her interest in the Perkins county land on which she held the mortgage, the use of which was devised to Losada L. Battey? This question seems to have been settled in *Woods v. Moore*, 4 Sandf. (N. Y. Super. Ct.) 579, 589. It was there said: "The rule established is very plain that, where it is clear that there was an intent that the property in question should pass, it will be held to pass, notwithstanding a misdescription, so long as there is enough of correspondence to afford the means of identifying the subject of the gift. The rule comes to this that, where it is necessary to carry out the intent that the will shall operate on the real estate, it will be held so to operate, although the object is not thus described, and *vice versa*. So when the devise is of land, and it turns out that the testator's interest was a mortgage upon the same land, the law may pass his estate as mortgagee, such as it actually existed, with all his rights and interests in the debt,

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and in the land itself growing out of that relation to it." This rule is supported by *Corey v. Dinsmoor*, 226 Ill. 438; *Heirs of Wright v. Minshall*, 72 Ill. 584; 2 Boone, Real Property (2d ed.) sec. 344; *Scebrock v. Fedawa*, 33 Neb. 413; 1 Jarman, Wills (6th ed.) p. 672 (*647). "A devise of specific realty of which testator is mortgagee will show testator's intention to pass the mortgage by that description." Page, Wills, sec. 483. Schouler, Wills (3d ed.) sec. 495; Hawkins, Wills (2d ed.) p. 35; 2 Redfield, Law of Wills (3d ed.) p. 135. Many other authorities could be cited in support of this proposition. It therefore seems clear that the will of Pauline A. Battey conveyed her interest as mortgagee in the Perkins county land to Losada L. Battey, during his life, and as to that interest she did not die intestate.

The next question* for our determination is: Did the power of sale contained in the will authorize the executor to sell and dispose of the interest thereby conveyed? Upon that question the will provided: "I further devise and bequeath to my son, Losada L. Battey, the use of the following described property, with the provision that the executors of this my last will have the power and are hereby instructed to sell all or any of the property hereinafter described." Her interest as mortgagee of the Perkins county land was contained in the description of the property devised. It is conceded by all the parties that Galen S. Battey, as executor, had the power under the will to take title to this land in payment of and to cancel the mortgage debt. This was done, and when the title was conveyed to him as executor he took and held the same as personal estate, and was charged therewith as such administrator. Where land is taken in payment of debts due the estate, such land becomes assets of the estate, and may be sold without an order of the court, even though no power of sale is contained in the will. 18 Cyc. 351. Such land will be treated as personalty, and may be sold by the executor without an order of the court in those jurisdictions where he is not required to obtain leave of court to

sell personalty. *Stevenson v. Polk*, 71 Ia. 278; *Williams v. Towl*, 65 Mich. 204. In *Edney v. Baum*, 70 Neb. 159, 167, it was said: "At common law the executor had the full title and *jus disponendi* of the personal estate. 1 Woerner, American Law of Administration (2d ed.) sec. 175; Schouler, Executors and Administrators (3d ed.) sec. 239; *Field v. Schieffelin*, 7 Johns. Ch. (N. Y.) *150; *Petersen v. Chemical Bank*, 32 N. Y. 21, 88 Am. Dec. 298. All of the above authorities hold that heirs, devisees or creditors have no right to pursue this property in the hands of one who has acted in good faith and in no way united with the trustee in a *devastavit*. Unless a different rule is established by statute, then, the right of disposing of these goods as if they were their own belonged to these executors." In the instant case the power was vested in the executor, Galen S. Battey, to sell the Perkins county land, and it was unnecessary for him to obtain authority of the court so to do. In 11 Am. & Eng. Ency. Law (2d ed.) 1007, it is said that the statutes requiring an order of the court to sell personal property are for the protection of the executor and are directory only. *Flynn v. Chicago G. W. R. Co.*, 141 N. W. (Ia.) 401. It follows that when Galen S. Battey sold the land in question to W. L. Rutledge in good faith for full value, and conveyed the title thereof to him by executor's deed, Rutledge obtained a perfect title thereto, and the administrator was required to account to the estate for the purchase price thereof.

It further appears that Galen S. Battey, at the proper time, settled all of his accounts with the administrator *de bonis non* of the estate of Pauline A. Battey, and was discharged as such administrator; that Frank A. Nye, administrator *de bonis non*, settled his accounts with the estate, and has been discharged. It is not claimed or intimated that the estate or that Losada L. Battey had not received the purchase price of the land in question and converted it to his own use, and the presumption is that it was so received and converted. It appears that at all times during the settlement of the estate of Pauline A. Battey all of

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the persons interested therein were of full age and legally responsible for their acts. It follows that, at the time Losada L. Battey and wife made the quitclaim deed under which the plaintiff claims title, neither of them had anything to convey, and Losada was clearly estopped from making any claim to the land in question. *Borcher v. McGuire*, 85 Neb. 646; *Kulp v. Heimann*, 90 Neb. 167; *O'Donnell v. Heimann*, 90 Neb. 172; *Weekes v. Heimann*, 90 Neb. 173; *Mote v. Kleen*, 83 Neb. 585. For the reasons given in those cases, Galen S. Battey was also estopped from claiming any interest in the land in question, and his deed conveyed nothing to the plaintiff. It follows that the proceedings of the county court of Bureau county, Illinois, had after defendants obtained their title to the land in question, could in no way divest them of that title.

As we view the record, the defendants were entitled to the findings and judgment, and the cause is reversed and remanded to the district court for Perkins county, with instructions to dismiss the plaintiff's action and render a judgment for the defendants Shuter and Westphalen, quieting their title to the land in question.

REVERSED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

NEWTON RULE, APPELLANT, v. SIOUX COUNTY, APPELLEE.

FILED DECEMBER 24, 1913. No. 17,494.

1. **Appeal: CONFLICTING EVIDENCE.** Where the question of the amount of damages which a landowner has sustained by the opening of a county road has been fairly submitted to a jury upon conflicting evidence, the verdict will not be set aside unless it is clearly wrong.
2. **Highways: OPENING: DAMAGES.** Section 46, p. 130, laws 1879 (Comp. St. 1905, ch. 78, sec. 46), accepting the grant provided by the act of congress of 1866 (Rev. St. U. S. sec. 2477), reserves to

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landowners the right to recover damages for the opening of public roads on section lines in this state. *Scott's Bluff County v. Tri-State Land Co.*, 93 Neb. 805.

APPEAL from the district court for Sioux County: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Albert W. Crites, for appellant.

Fern S. Baker, Allen G. Fisher and William P. Rooney, contra.

BARNES, J.

Appeal from a judgment of the district court for Sioux county awarding the plaintiff certain damages alleged to have been sustained by him as a landowner for the establishment of two county roads by the commissioners of said county.

It appears that in July, 1906, the county board of Sioux county established a highway, called the Hecker road, on the section line between sections 25 and 26, township 30, range 55 west. This road divides the land of Mr. Rule so as to segregate the southwest quarter of section 25 from the remaining three quarters of his farm, and appropriates six acres of his land. At or about the same time the commissioners established another road on the section line between sections 26 and 30 of said township and range, which segregated plaintiff's farm from a tract of land which plaintiff's son had filed on as a homestead prior to his death, which occurred before he had made any improvement thereon. Plaintiff claimed damages to this tract of land, as well as to his own farm, for the opening of the highway, which is designated as the Trowbridge road. Plaintiff filed his claims for damages, which were disallowed by the county board, and on an appeal to the district court a jury awarded him a verdict for \$139. Judgment was rendered on the verdict, and plaintiff has appealed. The county has also filed a cross-appeal.

The plaintiff contends that the jury disregarded plaintiff's evidence, and perversely returned a verdict for a less amount than the testimony warranted. We have examined the record with considerable care. It appears that by the opening of the two roads above mentioned there was appropriated about nine acres of the plaintiff's land. The plaintiff's testimony, and that of some of his witnesses, estimates the value of this land at from \$10 to \$25 an acre. It must be observed that the testimony of all of plaintiff's witnesses was based on what the land would be worth to them, and not as to its market value. The testimony was clearly incompetent, and could not be considered as furnishing the proper measure of damages. On the other hand, the defendant's witnesses all testified that the market value of the land taken for road purposes was from \$4 to \$5 an acre. Taking the highest amount shown by this evidence, plaintiff would be entitled to \$45 for the land thus taken. It further appears that plaintiff would be required to move one-half a mile of fence by reason of the Hecker road, and construct another half mile of fence on the opposite side of this road, the cost of which is estimated by the defendant's witnesses at from \$70 to \$80. By the opening of the Trowbridge road plaintiff was required to move his chicken house and a few rods of fence along the side of his corral. This the testimony seems to indicate would cost him in the neighborhood of \$10. Plaintiff also claimed damages for the building of a fence along the line of the Trowbridge road; but it appears that no fence had ever been built along the line of that road, and, when it is built, it could be as inexpensively constructed upon the line of road as upon the section line. He also claimed damages for the digging of a well. But it appears that the road was laid out so as to avoid interfering with the plaintiff's well. Much of the damages claimed by the plaintiff was merely speculative, and the evidence tends to show that it was his theory that, by reason of the establishment of the roads in question, the county was liable to pay him for all of his fences, and all

ERNEST C. PACKARD ET AL., APPELLEES, v. LEROY A. DE
VOE, APPELLANT.

FILED DECEMBER 24, 1913. No. 17,519.

1. **Appeal: INSTRUCTIONS.** Where the record clearly shows that no exceptions were taken to the instructions given the jury by the trial court, error cannot be predicated on the giving of such instructions.
2. ———: **ASSIGNMENTS OF ERROR: BRIEFS.** If appellant's brief fails to set out particularly errors asserted and intended to be urged for a reversal, vacation or modification of the judgment, final order or decree alleged to be erroneous, such alleged errors will not be reviewed on appeal.

APPEAL from the district court for Keith county: HAN-
SON M. GRIMES, JUDGE. *Affirmed.*

A. Muldoon and Leroy A. De Voe, for appellant.

William E. Shuman, contra.

BARNES, J.

This action was commenced before a justice of the peace of Keith county to recover \$160 for services rendered by plaintiffs to defendant in the sale of certain land situated in said county. The plaintiffs had the judgment, and the defendant appealed to the district court, where, on a trial to a jury, the plaintiffs were given a verdict and judgment for the sum of \$122.92, and the defendant has brought the case to this court by an appeal.

It appears that the defendant bid in a half section of land at a referee's sale on January 22, 1910, which sale was not confirmed until after the defendant resold the land to a purchaser with whom the plaintiffs put the defendant in touch; that, without any outlay on defendant's part, the sale was made at an advance of \$500 over the sum bid at the referee's sale. The defendant filed a general denial to plaintiffs' petition, and upon the trial it was shown,

beyond question, that defendant had by certain letters authorized the plaintiffs to assist him in making the sale, which was afterwards consummated. The district court, among other things, instructed the jury as follows: "The jury are instructed that it is no defense that the defendant sold the land for less than the price at which he requested the plaintiffs to sell the land. The plaintiffs, even if such is true, are entitled to compensation for such services as they rendered, if said plaintiffs were the procuring cause of the sale of said land." The testimony disclosed the fact that plaintiffs found the purchaser, and informed the defendant of that fact, and put the parties in communication with each other; that there was some negotiation about the price of the land, and that defendant finally sold it to the purchaser for a less price than he had quoted it to the plaintiffs. We find from an examination of the record that no exceptions were taken by the defendant to any of the court's instructions, and the cause was tried upon the issues presented by the instructions without objection.

It is next contended that there was a defect of parties, and the plaintiffs cannot recover under the contract; that the suit is brought in the name of Ernest C. Packard and Otis B. McLaughlin, and that there was no evidence to show that the defendant in any manner listed the land with the plaintiff, Otis B. McLaughlin, or the partnership as such. The letters, with other evidence produced by plaintiffs, clearly established the fact that defendant understood the land was listed with the plaintiffs, and the defendant's contention cannot be sustained.

It is also contended that the verdict is excessive, but we find from an examination of the record that the evidence fully sustains the amount of the judgment.

This record is a peculiar one. It contains no objections, except as to the sufficiency of the letters to constitute a contract, and no exceptions of any kind appear therein. Appellant's brief fails to comply with the provisions of section 675c of the code, which provides: "The brief of appellant shall set out particularly each error asserted

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and intended to be urged for the reversal, vacation or modification of the judgment, decree or final order alleged to be erroneous." In such case, assignments not so made and definitely discussed in the brief will not ordinarily be considered. *Warham v. Fink*, 86 Neb. 180; *First Nat. Bank v. Hedgecock*, 87 Neb. 220.

The judgment of the district court is

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

IN RE ESTATE OF ANNA FRANCIS.

ABRAM C. STRONG, APPELLANT, v. HATTIE S. POTTS ET AL.,
APPELLEES.

FILED DECEMBER 24, 1913. No. 17,524.

Wills: PROBATE OF COPY: PROOF REQUIRED. On an application to probate an alleged copy of a will made 19 years after the original will was executed, it is incumbent upon the proponent to show what became of the original will, in whose custody it was placed, account for its nonproduction, and produce some competent proof of its contents, in order to authorize the county court to probate such a copy.

APPEAL from the district court for Hayes county:
ROBERT C. ORR, JUDGE. *Reversed with directions.*

John Everson, for appellant.

Lambe & Butler and *C. A. Ready*, contra.

BARNES, J.

This is an appeal from a judgment of the district court for Hayes county in a proceeding in error from a judgment of the county court of that county, probating an alleged copy of the will of one Anna Francis, *nee* Strong, who departed this life in the state of Colorado. It appears that no will of the deceased was ever probated in the state

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of Colorado, where she died, and that on or about the day of May, 1907, one George Strong filed what purported to be a copy of a will alleged to have been made and executed by Anna Francis, *nee* Strong, in Hayes county, Nebraska, about the year 1887, by which she devised her sister, Hattie Potts, the northeast quarter of section 27, township 7, range 35 west, situated in said county and state. Such proceedings were had in the county court that the purported copy of the will was admitted to probate. From the judgment of the county court the testator prosecuted error to the district court.

It was first contended that no petition for the production of the copy of the alleged will was ever filed in the district court, and therefore that court was without jurisdiction. The transcript, however, recites that such a petition was filed, and, although no copy of it is found in the record, still the recitation of the fact of the filing of such a petition will be taken as true, and therefore the court was without jurisdiction.

It is next contended that the execution of the original will, an alleged copy of which was presented for probate, was not sufficiently proved to entitle the same to probate. The transcript discloses that the proponent produced the following evidence: First. An *ex parte* affidavit by one T. Meredith made before a notary public, in the state of California, which reads as follows: "I hereby certify that about the year 1887 or 1888 I signed as a witness a will attached hereto, in substance. Same was a will signed by Anna Strong, in favor of Mrs. Ed. Potts. The exact wording of same will I cannot remember. This will was made at Hayes Center, Hayes county, Nebraska. (Signed T. Meredith." Subscribed and sworn to before a notary public. Second. Proponent produced an *ex parte* affidavit made by one M. E. Davis in Cannon county, state of Idaho, as follows: "I hereby certify that the above is a true copy of a will drawn by Anna Strong at Hayes Center, Nebraska, in the year 1888 or 1889 as I remember. (Signed) M. E. Davis." Subscribed and sworn to before

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a notary public. Third. Proponent also produced the following affidavit: "I hereby certify that the document hereto attached is a true copy of a will drawn by me for Anna Strong at Hayes Center, Nebraska, as I now remember, in 1888 or 1889. (Signed) Jesse Davis." Subscribed and sworn to before a notary public.

There was a partial hearing, and thereafter the proponent produced one Rosa May as a witness before the county court. Her testimony was reduced to writing and made a part of the transcript, and reads as follows: "My name is Rosa May. I am a resident of Hayes county, Nebraska, and 52 years of age. I was acquainted with Anna Francis, *nee* Strong, the deceased, in her lifetime. Said Anna Francis, *nee* Strong, at the time of her death was a resident of Colorado, and had resided in said county for at least four years next before her decease. Said Anna Francis, *nee* Strong, departed this life on or about the 12th day of August, 1897, in said county. I am not one of the subscribing witnesses, but I heard her say that she made this will to Hattie S. Potts. Anna Francis, *nee* Strong, at the time she executed said instrument was of sound mind and memory and under no restraint whatever, and was about the age of 21 years."

Upon this evidence the purported copy of the will was admitted to probate, and from that judgment or order of the county court the contestant, a brother of the deceased, prosecuted error to the district court, where on the 19th day of September, 1911, the judgment was affirmed.

It is contestant's argument that the testimony found in the transcript from the county court is insufficient to sustain the judgment admitting the will to probate. The record, as it appears, contains no testimony explaining the absence of the original will; nothing is shown relative to its custody from the time it is claimed it was executed until the alleged copy was presented for probate, which was some 19 years after it was alleged to have been executed. Its loss is not shown, and no explanation is given showing, or tending to show, who made the copy of the

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will, or from whom it was produced. It is contended ever, that, as there was no bill of exceptions settled county court and made a part of the record, the petition would obtain that there was sufficient evidence to authorize the entry of the judgment from which error was prosecuted; and that neither the district court nor the county court will attempt to review the findings of the county court for that reason. Ordinarily this would be true if the record contains the transcript from the county court which sets forth the application which was to probate a copy of an alleged will, without any allegations which would authorize the court to act without the production of the will itself. The original will was not produced, and whereabouts were not accounted for in the application for probate, and no reason was given why it was not produced. The district court could not presume that under the circumstances such proof was in fact made as would authorize the court to probate the copy produced.

As we view the record, the district court erred in affirming the judgment of the county court, and therefore the judgment of the district court is reversed and the case is remanded, with directions to that court to reverse its judgment of the county court and remand the cause to that court for further proceedings.

REVERSED

LETTON, FAWCETT and HAMER, JJ., not sitting.

ABRAM C. STRONG, APPELLANT, v. HATTIE S. POTTS ET AL.
APPELLEES.

FILED DECEMBER 24, 1913. No. 17,525.

Wills: PROBATE OF COPY. The right to prosecute this action depends upon the result of the application to probate the alleged will. *In re Estate of Francis, ante, p. 742.*

APPEAL from the district court for Hayes county.
ROBERT C. ORR, JUDGE. *Reversed.*

John Everson, for appellant.

Lambe & Butler, contra.

BARNES, J.

This is an appeal from a judgment of the district court for Hayes county dismissing plaintiff's action for the partition of the northeast quarter of section 27, township 7, range 35 west, situated in said county.

It appears that Abram C. Strong filed his petition in said cause alleging that he is a brother of Anna Francis, *nee* Strong, who died intestate in the state of Colorado, seized of the land above described; that she left no children surviving her, but left the following named heirs: Hattie S. Potts, George Strong, Sarah F. West, Alida Bull, Jennie Doyle, Walter Calkins, Mabel Hall, Mary Clemons, and the plaintiff; that plaintiff inherited an undivided one-eighth interest in said land, and is the owner by purchase of the interest of certain others of the heirs. The petition also sets forth the proceedings to probate a copy of an alleged will of the deceased had in the county court of Hayes county, and alleged that said proceedings were void, and prayed for a decree partitioning said real estate between said heirs. To this petition the defendant Hattie S. Potts filed an answer and cross-petition admitting that Anna Francis was Anna Strong; that said Anna Strong died as in said petition alleged, and that the names of her heirs are therein correctly set forth. In her cross-petition it was alleged that on or about the 23d day of May, 1907, and after the death of said Anna Strong, whose name at the time of her death was Anna Francis, a petition was filed in the office of the county judge of Hayes county, Nebraska, to probate a copy of her alleged will, and thereafter a notice was duly published in form required by law, and a date was fixed by said court for a hearing upon said petition; that thereafter such proceedings were had that the copy of said will was admitted to probate, and that by said will the land in question was devised to her; and concluded with a prayer to quiet her title thereto.

A trial of the case was had to the court in all respects as though a reply had been filed to the answer and cross-petition, but by mistake or inadvertence no such reply was filed until the testimony was all taken. It was then discovered that the plaintiff had neglected to file his reply, and an application was made to the court for leave to file the same, which was denied, and the court rendered a judgment dismissing plaintiff's suit.

It appears that since the case was brought to this court by appeal plaintiff departed this life, and the action has been revived in the name of Clara Strong, as executrix of his estate.

It is first contended that the district court erred in refusing to permit the plaintiff to file his reply. It appears that the cause was tried in all respects as though a reply was on file during the entire time of the trial. The reply contains no allegations of new matter, and no reason has been suggested why the court refused to allow the same to be filed: As we view the record, it was error for the court to refuse the plaintiff leave to file his reply.

Again, it is contended that the judgment in this case should be reversed because the defendant pleaded and relied upon the probate of a copy of an alleged will made by Anna Francis, *nee* Strong, by which the land in question was devised to the defendant, Hattie S. Potts. On that question it is sufficient to say that in *In re Estate of Francis, ante*, p. 742, it was held that the county court erred in admitting the alleged copy of the will to probate, and that cause was reversed and remanded for further proceedings.

It follows, therefore, that the district court erred in dismissing the plaintiff's action, and the judgment of that court is reversed and the cause is remanded for further proceedings dependent upon the result of the petition to probate the alleged will described in *In re Estate of Francis, ante*, p. 742.

REVERSED.

LEWTON, FAWCETT and HAMER, JJ., not sitting.

Witt v. Old Line Bankers Life Ins. Co.

JOHN WITT, APPELLANT, v. OLD LINE BANKERS LIFE
INSURANCE COMPANY, APPELLEE.

FILED DECEMBER 24, 1913. No. 18,080.

1. **Insurance: ACTION TO RECOVER PREMIUM: PLEADING AND PROOF.** In an action to recover an advanced premium paid on an application for a policy of life insurance, where plaintiff alleges that he has refused to submit to such a medical examination as was provided for in the application and requested by the company, it is incumbent on the plaintiff to allege and prove that the contract has been rescinded, or facts which amount in law to such a rescission, in order to maintain the action.
2. ———: ———: **PETITION: SUFFICIENCY.** The averments of the plaintiff's amended petition examined, and found to be insufficient to sustain a judgment in his favor.

APPEAL from the district court for Dodge county:
CONRAD HOLLENBECK, JUDGE. *Affirmed.*

Courtright & Sidner, for appellant.

C. Petrus Peterson and G. L. Loomis, contra.

BARNES, J.

This case is before us on a third appeal. When the mandate was returned to the district court after the case was decided the second time, the plaintiff filed an amended petition which contains certain allegations, in addition to those set forth in the original petition, relating to certain letters which passed between plaintiff and defendant, and which explained the delay which occurred in making the medical examination of plaintiff. Then followed the facts relating to the medical examination, and the subsequent proceedings; and plaintiff alleged that, on or about the 6th of April, 1906, he wrote and delivered to the defendant a letter as follows: "I have been waiting for some time for either a policy or the return of my note. Unless I receive one of the two very soon I shall start proceedings at once." On April 12, 1906, defendant wrote and de-

livered to plaintiff a letter as follows: "We have your favor of the 6th. Your application was taken August 10. Your examination was not received until six and one-half months later, so there is no indication that you were in any great hurry. If your note is past due you can pay it, and if you are declined the money will be paid back to you. I think no doubt the matter will be settled in a short time. I hope the policy will be issued. The agent has paid us for your insurance, so we have not the note in our possession. He probably discounted it at the bank." It was then alleged that plaintiff heard nothing further from the defendant until about the 1st of July, 1906, at which time a party representing himself to have come from the defendant called on the plaintiff and requested a further medical examination, which plaintiff at said time refused to give. It was further alleged that this was the first time that defendant had any knowledge that any further examination was desired; and that no other communications, oral or written, were had between the plaintiff and the defendant. It was also alleged that the distance from the place where said application was taken, being at the residence of plaintiff in Dodge county, Nebraska, to the home office of the defendant at Lincoln, Nebraska, was and is 77 miles, and there then was, and always has been, at least two mail trains each day between said points; that 30 days after the receipt of the medical examination by the defendant was an abundance of time for the defendant to either accept or reject said application, and in which to notify the plaintiff of its action in that respect; that the defendant delayed for an unreasonable time the execution and delivery to the plaintiff of a policy on his application previous to plaintiff's letter of April 6, 1906, and again delayed said matter for an unreasonable time after plaintiff's letter of April 6, 1906, and such unreasonable delays, and each of them, and also the letter of defendant to plaintiff on April 12, 1906, constituted refusals to issue to plaintiff a policy upon his application, each and all without notice to plaintiff that any further medical examina-

tion was desired, and by said delay and refusal, as herein more particularly stated, the defendant on March 26, 1906, and again on April 12, 1906, and again 30 days thereafter, was in default of the terms of its contract to deliver to plaintiff a policy by reason of such unreasonable delay, and defendant has been continuously from April 12, 1906, in default of its contract to either return to plaintiff the premium paid by him or to issue to him the policy of life insurance upon the said application, and said default and breach of the terms of said contract by the defendant was complete previous to the transaction of about July 1, 1906, when the defendant first made known to plaintiff its desire for a further medical examination; that defendant declined to approve plaintiff's said application, and has ever since said time refused, and does now refuse, to issue a life insurance policy to the plaintiff; that no part of said payment made to the defendant by plaintiff has ever been returned to the plaintiff, and there is now due and unpaid from defendant to plaintiff \$237.85, with interest thereon, for which sum the plaintiff prayed judgment. To the amended petition the defendant interposed a general demurrer, which was sustained. The plaintiff declined to further plead; judgment was entered for the defendant, and the plaintiff has appealed.

Plaintiff now contends that the amended petition stated facts sufficient to entitle him to a judgment in his favor, and it is argued that by the averments found therein, which were not contained in the original petition, it is shown that plaintiff had rescinded the written agreement on which the action was originally founded before the action was commenced; or that by reason of those averments plaintiff was entitled to consider the contract rescinded, and therefore could maintain this action.

In construing the amended petition all of its allegations must be considered together. So construing the petition, it must be conceded that at the outset plaintiff sought to recover under the terms of the written contract. Time was not of the essence of that agreement, for it was said

in the opinion written upon the first appeal (89 Neb. 481). "The stipulations relating to the return of the premium and requiring plaintiff to submit to the examination of a physician 'Policy to date at issue, provided said application is approved by said company; otherwise said payment is to be returned to said applicant. It is hereby agreed and understood that a refusal, after being written, on the part of the applicant to submit to a medical examination, shall forfeit the payment herein.' The examination contemplated by the contract was, of course, the requisite medical examination required by all reputable life insurance companies before assuming a risk. On the face of the contract the assurer was not limited to a single examination by a physician first designated, like the one pleaded. The report of the examiner may have omitted some fact vital to the assuming of the hazard. Symptoms requiring a re-examination by a specialist may have been reported by the defendant as a result of the examination pleaded. Plaintiff's right to the policy for which he stipulated depended upon an examination commensurate with the risk assumed. In the very nature of the policy for which an advance premium was paid, a single examination, complete or unsatisfactory, could never have been within the contemplation of the parties. Safe underwriting practice bids such a construction of the contract. For any reason appearing in the allegations relating to performance on the part of plaintiff, his own capricious refusal to submit to further examination may be the sole cause of defendant's failure to issue the policy."

We adhere to the rule there announced, and it follows that when the plaintiff, in the amended petition, alleged that he had refused to submit to any further medical examination, it was then incumbent upon him to show that his refusal was justified as a matter of law and entitling him to declare the contract rescinded. Plaintiff's attempt to plead such a justification falls far short of constituting a sufficient legal excuse on his part. His motion of April 6, 1906, did not declare the contract at an

or that he had rescinded the same, it simply notified the defendant that, if he did not receive the policy or his money back within a short time, he would take some action thereon. In answer to this letter the secretary of the company wrote the plaintiff that his application was taken August 10, and his examination was not received until six and one-half months later; so that there was no indication that he was in any great hurry. The letter then informed plaintiff that his note was past due, and if his application was declined the money would be paid back to him, and indicated that the matter would be settled in a short time, and expressed the hope that the policy would be issued. It is averred in the petition that, on or about the 1st of July, a party representing himself to have come from the defendant called on the plaintiff and requested a further medical examination, and that plaintiff at that time refused to submit to such further examination. This was a direct breach of the contract upon the plaintiff's part. As before stated, time nowhere appears to be the essence of the contract, and it is not averred in the amended petition that the plaintiff had ever notified the defendant that he considered the contract at an end. It appears that up to February 26, 1906, there were no objections on plaintiff's part to the delay in making the medical examination. In fact, it appears that the delay was for plaintiff's benefit, and was acquiesced in by him.

It has been the theory of this court from the time the case first came here on appeal that the plaintiff, by submitting himself to such a complete medical examination as the defendant required, would be in a position to receive his policy; or, in case his application was rejected, to recover back his money, and we are still of the same opinion. It seems quite clear that, if the plaintiff should submit himself to the proper medical examination, it would then be the duty of the defendant to either issue the policy or return to him the money he paid as an advance premium. If, upon such an examination, it should appear that the plaintiff was not a suitable risk for life insurance,

the defendant would be obliged to reject his application and his right to recover the advanced premium would be complete. On the other hand, if the result of his medical examination should be such as to entitle him to a policy, then it would be the duty of the company to issue it to him, and, in case it should refuse to do so, he would be entitled to recover such advanced premium.

Counsel for the defendant has at all times persisted in the theory that all the plaintiff had to do was to demand his agreement at an end, and recover back his money. I think this theory was a mistaken one, and is not warranted by the terms of the written agreement. Plaintiff's contention that 30 days was a sufficient time from and after the 6th day of April, 1906, for defendant to issue the policy, and repay the advanced premium is simply a construction of the plaintiff's counsel has put upon the terms of the written contract between the parties, to which we cannot agree.

It is urged that, if this judgment is affirmed, the plaintiff will lose his advanced premium and is without remedy. But, as suggested in this opinion, plaintiff may still present himself to the defendant company for a further or complete medical examination, and upon such examination will be entitled either to receive his money or a policy of insurance in accordance with his application.

Viewing the record in the light of our former decision there was nothing left for the trial court to do but sustain the demurrer to the plaintiff's amended petition and therefore the judgment of the district court is

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

REESE, C. J., concurring.

Having dissented from the decisions in the former presentations of this case, I do not deem it necessary to restate my views upon the merits. I agree to the opinion.

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upon the express consideration that, should plaintiff submit to another examination and the application be accepted, he shall receive a policy without further cost or expense to him than if a policy had been issued upon the first examination, and that the annual premium be not increased. Should defendant fail or refuse to accede to these conditions it is liable to plaintiff for a return of the advance premium paid with legal interest from the time of payment.

STATE, EX REL. WILLIAM E. MILLER, APPELLEE, v. WILBUR F. BRYANT, COUNTY JUDGE, APPELLANT.

FILED DECEMBER 24, 1913. No. 18,351.

1. **Constitutional Law: "JUVENILE COURT LAW:" PUBLIC POLICY.** The provisions of chapter 59, laws 1905, entitled "An act to regulate the treatment and control of dependent, neglected and delinquent children," are not opposed to sound public policy. On the contrary, they tend to foster and promote such a policy.
2. ———: ———: **COURTS: JURISDICTION.** The provisions of the act above described defining the power and jurisdiction of the district court is not unconstitutional as creating a new court; such court being an existing court of general common law and equity jurisdiction, and recognized by the constitution.
3. ———: ———: **QUERE.** The proviso to section 2 of the act giving concurrent jurisdiction to the police judge in cities having a population of 40,000 and upwards, within the limits of such city, was not an inducement to the passage of the act, and it is not necessary in this case to determine its constitutionality.
4. ———: ———: ———. The legislative amendment of 1913 (laws 1913, ch. 38) to the act, which relates to the pensioning of dependent children who have indigent parents, is not involved in this controversy, and its validity is not decided.

APPEAL from the district court for Cedar county: GUY T. GRAVES, JUDGE. *Affirmed.*

Wilbur F. Bryant, pro se.

William E. Miller, contra.

BARNES, J.

Appeal from a judgment of the district court for Cedar county awarding the relator a writ of mandamus to compel the county judge of that county to file a petition, under the provisions of the juvenile court law of 1905, to issue the process of the court and proceed to a hearing thereon.

It appears that the relator prepared and tendered to the county judge, in the absence of the judge of the district court from Cedar county, a complaint in due form charging that one Leo Tatro, a child 13 years of age, living with his father at Hartington, in said county, is a neglected child, in that he has never been sent to the public school of the district in which he resides, or to any other school, as provided by the statutes of this state; and that he is kept at hard manual labor above and beyond his strength. The prayer of the petition was for process, and an examination before the court, and for such order as might be found necessary and proper in the premises. Relator at the same time tendered to respondent the necessary fees, which he refused to accept or receive, and thereupon respondent declined to file said petition, and refused to take any action thereon. Relator then commenced this action in the district court in mandamus. On a hearing on a demurrer to the application, the writ was awarded, and the respondent has appealed.

The respondent contends that the juvenile court law of 1905 (laws 1905, ch. 59; Comp. St. 1911, ch. 20, art. II) is against public policy, and summarizes his argument as follows: First, that this law makes the state the supreme authority over a child, while its parents are mere trustees; second, that section 14 of the original act permits brokerage in children; third, that the legislative amendment of 1913, which relates to the pensioning of children who have indigent parents, is unconstitutional and void.

The law in question, substantially in its present form, has been adopted by many of the other states, and the courts of those states have often been called upon to de-

termine its nature, scope, policy, and validity. It may be said that its purpose is to help, not punish, the child. Its functions are largely parental, and it acts in the interests of the child, not adversely thereto. The law is not of a criminal nature. The purpose of the criminal law is to punish, while the juvenile law is to help the child, and restraint is only imposed as a means of such help.

The policy and constitutionality of a statute very like our own was before the supreme court of Pennsylvania in *Commonwealth v. Fisher*, 213 Pa. St. 48, 62 Atl. 198. It was there said: "The design is not punishment, nor the restraint imprisonment, any more than is the wholesome restraint which a parent exercises over the child. The severity in either case must necessarily be tempered to meet the necessities of the particular situation. There is no probability, in the proper administration of the law, of the child's liberty being unduly invaded. Every statute which is designed to give protection, care and training to children, as a needed substitute for parental authority and performance of parental duty, is but a recognition of the duty of the state, as the legitimate guardian and protector of children where other guardianship fails. No constitutional right is violated, but one of the most important duties which organized society owes to its helpless members is performed just in the measure that the law is framed with wisdom and is carefully administered. The conclusions above expressed are in accordance with adjudications elsewhere with but very few exceptions."

In *In re Sharp*, 15 Idaho, 120, 96 Pac. 563, the court uses the following language: "We may premise our citation of authorities, however, by a general statement that this statute is clearly not a criminal or penal statute in its nature. Its purpose is rather to prevent minors under the age of 16 from prosecution and conviction on charges of misdemeanors, and in that respect to relieve them from the odium of criminal prosecutions and punishment. Its object is to confer a benefit both upon the child and the community in the way of surrounding the child with better

and more elevating influences and of educating and training him in the direction of good citizenship, and thereby saving him to society and adding a good and useful citizen to the community. This, too, is done for the minor at a time when he is not entitled, either by natural law or the laws of the land, to his absolute freedom, but rather at a time when he is subject to the restraint and custody of either a natural guardian or a legally constituted and appointed guardian to whom he owes obedience and subjection. Under this law the state, for the time being, assumes to discharge the parental duty and to direct his custody and assume his restraint."

In *Mill v. Brown*, 31 Utah, 473, 88 Pac. 609, the court said: "Such laws are most salutary and are in no sense criminal and not intended as a punishment, but are calculated to save the child from becoming a criminal. The whole and only object of such laws is to provide the child with an environment such as will save him to the state and society as a useful and law-abiding citizen, and to give him the educational requirements necessary to attain that end. To effect this purpose some restraint is essential."

Statutes of the nature of the one in question, unless they plainly conflict with the constitution, are generally taken by the courts to be the best evidence of an enlightened public policy. It is a naked assumption to say that any matter allowed by the legislature is against public policy. The best indication of public policy is found in the enactments of our legislatures. To say that such a law is of an immoral tendency is disrespectful to the legislature who no doubt designed by its adoption to promote morality. This court has gone so far as to hold that, before a law can be determined unconstitutional, the express provision of our constitution which the law contravenes must be pointed out. *Boyes v. Summers*, 46 Neb. 308. And it has been universally held that the party who claims the act is unconstitutional must be able to point to the particular section with which it is in conflict. *State v. Van Duzer*

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24 Neb. 586; *Rosenbloom v. State*, 64 Neb. 342; *State v. Nolan*, 71 Neb. 136. The respondent has failed to comply with this rule. A careful examination of the act in question convinces us that it is not opposed to, but is directly in line with, sound public policy.

The respondent's second contention is that the act in question violates the constitution because it establishes a new court not provided for therein, and defines its jurisdiction. Section 2 of the act provides: "The district court of the several counties in this state and the judges thereof in vacation, shall have original jurisdiction in all cases coming within the terms of this act." It further provides, in substance, that the county court in each county shall have concurrent jurisdiction with the district court, but that such jurisdiction shall not be exercised except in the absence of the judge or the judges of the district court from the county; that, where a proceeding has been instituted under the act before any county court, the jurisdiction of that court is continued until the final disposition of the case, and an appeal is provided for to the district court in the same manner as in civil cases. The section also provides for the calling of a jury in case a delinquent child is charged with a crime against the laws of the state. The section concludes with a proviso as follows: "In cities having a population of 40,000 and upward, the police judge thereof shall have jurisdiction under this act concurrent with the county judge within the limits of such city." By section 3 it is provided: "In counties having over 40,000 population, the judges of the district court shall, at such times as they shall determine, designate one or more of their number, whose duty it shall be to hear all cases coming under this act. A special court-room to be designated as the juvenile court-room, shall be provided for the hearing of such cases, and the finding of the court shall be entered in a book or books to be kept for that purpose, and known as the 'juvenile court record,' and the court may for convenience be called the 'juvenile court,'"

It appears that the legislative assembly of the state Pennsylvania passed an act similar to the one in question and conferred jurisdiction upon the court of quarter sessions in all cases arising thereunder. The constitutionality of that law was challenged in *Commonwealth v. Fisi* *supra*, and the act was declared constitutional. Section art. V of the constitution of that state, provides: "Judges of the court of common pleas learned in the law shall be judges of the court of oyer and terminer, quarter sessions of the peace and general jail delivery, and of the orphan's court, and within their respective districts shall be justices of the peace as to criminal matters." Section 26, art. V of the constitution of that state, also provides: "All laws relating to courts shall be general and of uniform operation and the organization, jurisdiction and powers of all courts of the same class or grade, so far as regulated by law, and the force and effect of the process and judgment of such courts, shall be uniform; and the general assembly is hereby prohibited from creating other courts to exercise the powers vested by this constitution in the judges of the court of common pleas and orphan's courts." The contentions were the same as in the case at bar, and the supreme court of that state, in passing on the question, said: "No new court is created by the act under consideration. In its title it is called an act to define the powers of an already existing and ancient court. In caring for the neglected and unfortunate children of the commonwealth, and in defining the powers to be exercised by that court in connection with these children, recognized by the state as its wards requiring its care and protection, jurisdiction is conferred upon that court as the appropriate one, and not upon a new one created by the act. The court of quarter sessions is not simply a criminal court. The constitution recognizes it, but says nothing as to its jurisdiction. Its existence antedates our colonial times, and, by the common law and statutes, both here and in England, it has for generations been a court of broad general police powers in a way connected with its criminal jurisdiction. Innumerable

able statutes upon our own books during the last two centuries attest this. With its jurisdiction unrestricted by the constitution, it is for the legislature to declare what shall be exercised by it as a general police court, and, instead of creating a distinctively new court, the act of 1903 does nothing more than confer additional powers upon the old court and clearly define them."

By the act under consideration no new court was created, but the already existing district court was given new and additional powers and jurisdiction. That court is a court of general common law and equity jurisdiction, and it was clearly within the power of the legislature to require that court to exercise the powers and jurisdiction provided for by the juvenile court law. At the same time the legislature provided that the county court should exercise the jurisdiction given the district court, in the absence of the judge or judges of that court from the county where the proceedings were instituted. The statute also properly provided that when a cause was commenced before the county judge he should retain jurisdiction until it was completed, and an appeal was provided for from his orders or judgment to the district court. Thus the matter of the administration of the law was placed in the district court. In *Robison v. Wayne Circuit Judges*, 151 Mich. 315, 325, in discussing the constitutionality of the juvenile court statute, the court said: "Such legislation as that under consideration is but a transfer of the jurisdiction which formerly reposed in the court of chancery, in the exercise of the right of the king as *parens patriæ* to the guardianship of children, to the juvenile courts which perform the duty of seeing that the child is properly cared for." We are therefore of opinion that the act in its main provisions violates no section of the constitution of this state.

It is urged, however, that the proviso to section 2 was the inducement for the passage of the entire act, and, the proviso being unconstitutional, the whole act must fail. An examination of the act discloses that it contains 19

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sections. Most of them provide for the mode of dealing with juvenile delinquents or dependents; and we cannot presume that the proviso giving to police judges in certain cities jurisdiction concurrent with that of the county judge was the inducement for the passage of the entire act. It is apparent that the proviso, if unconstitutional, can be eliminated without in any way affecting the other provisions of the act. In such case the remainder of the act being intelligible, complete and capable of execution, should be upheld. *Scott v. Flowers*, 61 Neb. 620.

Finally, it is argued by the respondent that the amendment to the act passed by the legislature of 1913, relating to pensions for indigent parents of neglected children, is unconstitutional. The amendment in question could not of course have been an inducement to the passage of the original act. The question of its validity is not involved in this proceeding, and therefore is not determined.

As we view the act in controversy, it does not offend any of the provisions of the constitution, and the judgment of the district court is

AFFIRMED.

JOHN F. BRADY, APPELLEE, v. JOHN B. MCGINLEY ET AL.;
ANNA HOOKSTRA, APPELLANT.

FILED DECEMBER 24, 1913. No. 17,467.

1. **Tax Foreclosure: RIGHT OF REDEMPTION.** In an action to redeem from a tax foreclosure sale and to set aside a sheriff's deed based thereupon, there was an error in the description of the land in the petition by the omission of a 40-acre tract, but the plaintiff offered to pay the amount of the taxes and interest found due on the whole tract by the foreclosure decree, and specifically described the tax proceedings and the sheriff's deed he desired set aside. The answer of defendant and a motion by a subsequent grantee to be let in to defend set forth specifically and correctly the entire tract. An amended petition was filed after the time for redemption had expired correctly describing the whole tract by including a specific description of the omitted 40 acres. *Held*, That the filing of such original petition, the tender of the redemp-

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tion money, and the answer defending as to the whole of the land involved in the tax foreclosure, preserved the right to redeem the entire tract.

2. **Appeal in Equity: MOTION FOR NEW TRIAL.** Where it is sought to review rulings of the district court with reference to the introduction of evidence made during the trial of a suit in equity, a motion for a new trial must be filed, so that the alleged errors may be called to the attention of that court and an opportunity be given it to correct the same before recourse is had to this court. *Farmers Loan & Trust Co. v. Joseph*, 86 Neb. 256.
3. **Tax Foreclosure: REDEMPTION.** Where the owner of land seeks to redeem from a valid sale under tax foreclosure proceedings to a person other than the plaintiff in the case, the purchaser is entitled to the amount of his bid with 12 per cent. interest thereon. *Butler v. Libe*, 81 Neb. 740, 744.

APPEAL from the district court for Holt county: **JAMES J. HARRINGTON, JUDGE.** *Affirmed as modified.*

W. R. Butler, for appellant.

F. M. Tyrrell, *contra*.

LETTON, J.

This is an action to set aside a sheriff's deed, issued in tax foreclosure proceedings, and subsequent conveyances, and to be allowed to redeem from the lien of taxes. The sheriff's deed was dated February 25, 1902. This action was begun in January, 1903. An answer was filed in February of that year, but no further proceedings were taken until April, 1908, when a motion to be let in to defend was filed by one Anna Hookstra, claiming through the title acquired by defendant McGinley, the grantee in the sheriff's deed. She was permitted to answer. The cause came on for trial in December, 1908. After the evidence was taken and the cause submitted, the plaintiff discovered that his petition described only 120 acres of the 160 purchased at the tax sale, and that the deed from Erastus Stevens, under which the plaintiff claims title, also misdescribed the land. Plaintiff was allowed to amend his petition so as to bring in his grantor as defendant, and

to ask for a reformation of the deed. The cause was continued for that purpose. An amended petition was filed setting forth the mistake in the deed from Stevens and praying for its reformation; alleging knowledge by defendant Hookstra of the fact that plaintiff had purchased the 160 acres described in the foreclosure proceedings, but that the deed only conveyed 120 acres of this tract; tendering the taxes due with interest at 12 per cent. from the date of sale, and also offering, if this be found to be insufficient, to pay whatever amount may be found due by the court.

The answer of defendant Hookstra denies that Stevens ever intended to convey or plaintiff to buy the northeast quarter of the northeast quarter of section 28; pleads that the amended petition was not filed until more than eight years after the date of the tax sale, and that the right to redeem the same expired more than six years before the amended petition was filed. As to the other land described in the original petition, the defendant admits that plaintiff is entitled to redeem by paying the taxes and interest, and providing that he pay defendant the amount due upon a mortgage given by a former owner of the land, in 1886, to one Jones. It is also pleaded that by plaintiff's deed he took title subject to the mortgage, which he assumed and agreed to pay; that defendant is the owner and holder of the mortgage and is entitled to the amount due thereon. The reply pleads that whatever right Jones had in the real estate was foreclosed and barred in the tax foreclosure proceedings, and his right to redeem expired two years after the sale; that the right of redemption of all the defendants in the action, except the plaintiff's grantor, Stevens, expired at the same time. At the trial the court reformed the deed from Stevens to plaintiff, found that the plaintiff was entitled to redeem the land from the tax sale upon the payment of \$450.15, this sum being made up of \$203.62 with interest at 7 per cent. from December 23, 1901, amounting to \$136.95, and the further sum of \$109.58 for subsequent taxes paid by the defendants

McGinley and Hookstra. No motion for a new trial was filed.

The evidence shows that Brady wrote to Stevens, who lived in Iowa, that there was a foreclosure pending against his land, and after some negotiations Stevens accepted \$10 for his equity; that the plaintiff wrote the erroneous description in the deed, that he intended to describe the 160 acres which McGinley purchased, and that about that time he told McGinley he was going to commence an action to redeem the land. The record of the tax foreclosure proceedings shows that the real estate itself was made a party defendant, as well as Stevens, Jones, the mortgagee, and Mary R. Phelps, the assignee of the mortgage.

There are three contentions made by the appellant: First, that the two years allowed for redemption from tax sale had expired as to the 40 acres not described in the original petition before it was brought into the case by the amended petition; second, that the court should have required the plaintiff to tender or pay the amount of the mortgage and interest before permitting redemption; and, third, that the decree is erroneous with respect to the allowance of interest.

An examination of the record discloses a succession of errors. The plaintiff erroneously described the land when he drew the deed from Stevens to himself; another and different error was made in the description set forth in his petition; the decree of the court in describing the land which Stevens sold to Brady, if correctly copied in the transcript, omits one 40-acre tract; and the defendant's attorney, in the abstract, does not set forth the description as shown in the decree, or even as it should be. The 160 acres is properly described in the tax foreclosure proceedings and in the deed to McGinley. In the deed from Stevens to Brady 20 acres is properly described, but the southeast quarter of the northeast quarter of section 28 is included, which the grantor did not own, and the northeast quarter of the northeast quarter of that section, which he did own, was omitted. In the first petition filed, the

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plaintiff pleads in detail the tax foreclosure proceeding and shows that his desire is to set aside the sheriff executed to McGinley. In the answer, McGinley states that he is the owner of the whole 160 acres by virtue of the foreclosure proceedings, describing the land correctly in all respects, and apparently defending as to the title to the tract. This answer was on file when he parted with title, and when Mrs. Hookstra moved to be made a defendant. In this motion she described the 160 acres correctly, and set forth that "McGinley conveyed an interest in said real estate deeded to him by the sheriff of Holt county, Nebraska," and that this defendant is the owner and holder thereof.

It is apparent from this review of the proceeding when we consider the petition and the answer of McGinley, the redemption of the whole 160 acres was the purpose of the action; that Mrs. Hookstra was aware of this as shown by the recitals in her motion to be let in to defend. She cannot now insist that the 40 acres omitted from the petition by mistake was not involved in the controversy until after the plaintiff's amended petition was filed. The issues were first made up the time for redemption had not expired, and the beginning of the action and the time for redemption money was sufficient to prevent the effect of the statute falling as to the whole tract.

As to the claim that plaintiff should be compelled to pay the mortgage as a condition of redemption: The notes and mortgages were not received in evidence, upon objection made by the plaintiff. No motion for a new trial was made. Where it is sought to review rulings made during the trial it is necessary that a motion for a new trial be filed, setting up the alleged errors, so that the attention of the district court may be called to the same and he be given an opportunity to correct any material error before recourse is had to this court for a new trial. *Farmers Loan & Trust Co. v. Joseph*, 86 Neb. 256. This complaint, therefore, cannot be considered.

With respect to the amount of interest allowed in

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decree: In a case of this kind, where the owner of land seeks to redeem from what seems to be a valid sale under a tax foreclosure to a person other than the plaintiff in the case, it is his duty, under the statute, to pay the purchaser the amount of his bid with 12 per cent. interest thereon. *Butler v. Libe*, 81 Neb. 740, 744. The plaintiff in his amended petition offers to pay 12 per cent., and it must have been by an oversight that the decree was otherwise.

For these reasons, the judgment of the district court is modified so as to require the plaintiff to pay the amount of the bid with 12 per cent. interest, instead of 7 per cent., and the decree is corrected so that the title of the plaintiff, if he comply with the conditions of redemption, be quieted in the 160 acres described in the tax foreclosure proceedings. In all other respects the judgment of the district court is affirmed.

AFFIRMED AS MODIFIED.

BARNES, ROSE and SEDGWICK, JJ., not sitting.

IN RE ALFRED BOLING.

ALFRED BOLING, APPELLANT, v. W. H. JONES, APPELLEE.

FILED DECEMBER 24, 1913. No. 17,470.

Appeal: DISMISSAL: MOOT QUESTION. A. was arrested upon a criminal charge and required to give a recognizance in the sum of \$500 to appear before the district court. After having given the same, and after having been released and discharged from custody, he was again arrested under a warrant issued by the same magistrate on a motion to increase the amount of the bond, and the bond was increased to \$1,000. Failing to give this he was committed to the county jail. Habeas corpus proceedings were then brought in the district court to secure his release. From an adverse judgment he appealed to this court. No attempt was made to advance the case, and pending proceedings he was tried on the original charge and acquitted. Upon a motion to dismiss the appeal, *held* that, having obtained his liberty by due course of law, the question has become one in the abstract, and the appeal is dismissed.

APPEAL from the district court for Nemaha county:
JOHN B. RAPER, JUDGE. *Appeal dismissed.*

Lambert & McCarty, for appellant.

F. G. Hawxby, contra.

LUTTON, J.

Alfred Boling was arrested upon a criminal charge filed in the county court of Nemaha county. He had a preliminary examination before the county judge, who held him to appear at the next term of the district court. Bail was fixed at the sum of \$500, and he was remanded to the custody of the sheriff in the meantime. Two days afterwards he appeared before the county judge with a qualified surety and entered into his recognizance in the sum fixed. He was released and discharged from custody. This was in the forenoon. On the same day a motion was filed in the county court by the county attorney to increase the amount of the bond, whereupon a warrant was issued directing the sheriff to again arrest Boling and bring him before the court. This was done and the amount of the bond increased to \$1,000. He refused to give the increased bond and was committed to the county jail. This proceeding in habeas corpus was brought to secure his release. The district court found "that said county judge had authority to order the rearrest of relator, and that by the rearrest of relator the surety on his bond or recognizance was released, and that he now stands charged with a crime before the said county judge without bail." The application was denied and Boling was remanded to the custody of the sheriff. A motion has been filed in this court to dismiss the petition in error for the reason that the record of the county court shows that the defendant immediately gave a new bond in the sum of \$1,000, to which sum it was increased by the county judge; that since the decision of the district court was rendered Boling has been tried in the district court upon the charge and has been acquitted

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and discharged, and the question presented is a moot one which it would be a waste of time for this court to consider, and without any benefit to the appellant.

The hearing was had in the district court on September 12, 1911. The transcript on appeal was not filed until January, 1912. No effort has been made in this court to have the case advanced for a speedy hearing. In the meantime the petitioner has been tried and acquitted, and is now free. In this condition of the record, the motion to dismiss the appeal is sustained and the petition in error dismissed at the costs of the petitioner.

DISMISSED.

BARNES, ROSE and SEDGWICK, JJ., not sitting.

FRANK J. HETZEL, APPELLEE, v. SOPHIA L. BENNETT,
ADMINISTRATRIX; GEORGE M. FADNER, APPELLANT.

FILED DECEMBER 24, 1913. No. 17,474.

Judgment: REVIVOR. A judgment was rendered upon an account in an action aided by attachment. The goods attached were replevied from the sheriff by a third party claiming to own the same. The sheriff obtained judgment in the replevin action for the value of the goods, which judgment was assigned to the original plaintiff. An action was afterwards brought by the original plaintiff against the sureties upon the replevin bond, which resulted in a judgment in an amount in excess of the first one, and which was afterwards satisfied by the plaintiff for a valuable consideration. Following this satisfaction the replevin judgment was assigned to A., and the original judgment was assigned to B., who satisfied the same of record. *Held*, That under these facts the judgment in the replevin case was satisfied and the assignee was not entitled to a revivor of the same.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Affirmed*.

William Baird & Sons, for appellant.

Lyle I. Abbott and I. J. Dunn, *contra*.

LETTON, J.

This action was brought by the assignee of a judgment to procure a revivor. The facts are as follows: In D. M. Steele & Company, a copartnership, brought action against Levi G. Hetzel and obtained judgment against him for the sum of \$4,108.89. A stock of goods belonging to him, which was then in possession of Levi G. Hetzel, was attached in the action. Frank J. Hetzel replevied the attached goods from the sheriff, who returned them. The suit was then revived in the name of his administratrix, who recovered a judgment for return of the property taken and damages in the sum of \$2,555.56, and, in case of failure to return, for \$10,800.98, with interest. Afterwards the administratrix, by order of court, assigned to D. M. Steele & Company a portion of this judgment amounting to \$4,024.08, with interest from November 1892. Before the beginning of the replevin suit and assignment of the judgment, the Steele-Smith Grocery Company, a corporation, succeeded to the copartnership of D. M. Steele & Company, and took over and became owner of all its assets, including the judgments against the Hetzels. On January 29, 1903, John M. Steele, original member of the firm of D. M. Steele & Company, assigned the judgment against Frank J. Hetzel to appellant George M. Fadner for a consideration of \$1. After the assignment to Fadner, on May 8, 1903, Lysh Abbott, as attorney for Frank J. Hetzel, procured an assignment of the original judgment against Levi G. Hetzel from the Steele-Smith Grocery Company, and also procured an assignment of the judgment against Frank J. Hetzel, which appellant now seeks to revive. These judgments were both discharged and satisfied of record, except as to costs, by Abbott on May 8, 1903. In August, 1892, an action was instituted in the district court for Douglas county by D. M. Steele & Company against Walter Selby and Jane Johnson, administratrix of Frank C. Johnson, deceased, as sureties upon the replevin bond given by

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Frank J. Hetzel, to recover the sum of \$4,024.08, with interest, being that portion of the judgment recovered by the sheriff's administratrix against Frank J. Hetzel and assigned to D. M. Steele & Company. In that action judgment was rendered against Walter L. Selby in favor of D. M. Steele & Company for \$5,736.66, with interest, and the cause was continued for service as to the other defendant.

On December 4, 1898, a satisfaction of this judgment was filed in the district court, signed "D. M. Steele & Company, by Dudley Smith, member of said firm," which recited that, in consideration of the assignment to plaintiff of two certain bonds of indemnity, "D. M. Steele & Company releases and acknowledges full satisfaction of the certain judgment rendered in its favor in the above entitled case against the said Walter L. Selby, and the clerk of said court is hereby empowered and directed to release the judgment upon the presentation of this paper to him."

The court found, in substance, that the assignment to Fadner made by John M. Steele was ratified by the Steele-Smith Grocery Company; that the assignment to Abbott of the judgment against Levi G. Hetzel was made after the assignment of the judgment against Frank J. Hetzel to appellant, and after Frank J. Hetzel had notice thereof; that the two judgments to the extent of \$4,108.89 were for the same indebtedness; that the assignment and release of the judgment against Levi G. Hetzel "was, in legal effect, a payment and satisfaction of the replevin judgment in the case of Sophia L. Bennett, administratrix, against Frank J. Hetzel, which was assigned to D. M. Steele & Company; that the satisfaction of the judgment in the main case against Levi G. Hetzel carried with it all dependent questions, of which the Frank J. Hetzel judgment was one." The petition for revivor was denied. Fadner appeals.

Appellant's brief is mainly devoted to establishing the proposition that the assignment made to him by John M. Steele of the Frank J. Hetzel judgment was authorized

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and ratified by the Steele-Smith Grocery Company that the later assignment to Abbott by the Steel Grocery Company of the judgment against Levi G. with notice of the assignment of the other judgment the satisfaction of the Levi G. Hetzel judgment could not operate to defeat the assignment to appellant. We are of opinion that the evidence supports the finding of ratification, but that this is really immaterial to the legal principles involved.

The judgment in the replevin case against Frank Hetzel and the judgment in the action upon the replevin bond against the surety were both rendered in aid of the collection of the principal debt evidenced by the judgment against Levi G. Hetzel. As long as all three judgments stood unsatisfied upon the court records, D. M. Steele & Company were entitled to one satisfaction, but it could at the same time receive a valuable consideration for the satisfaction and release of one and at the same time in force and effect another judgment based fundamentally upon the same cause of action. The assignment of the judgments could not alter this condition. 2 *Free Judgments* (4th ed.) sec. 467; *Craft v. Merrill*, 14 *Ill.* 456; *Bones v. Aiken*, 35 *Ia.* 534; *First Nat. Bank v. Indianapolis Piano Mfg. Co.*, 45 *Ind.* 5; *Cox v. Smith*, 1 *Ill.* 418. The satisfaction of any one of the three judgments would have satisfied the others, except, perhaps, as to the matter of costs. The assignee of any one of them is subject to this contingency, since he could have no greater rights than his assignor. In this case two of the three judgments have been satisfied of record—first, the judgment on the replevin bond; and, second, the judgment against Levi G. Hetzel in the original action. The satisfaction of any one of these judgments was a satisfaction *pro tanto* of all, and the appellant is not entitled to a writ.

The judgment of the district court is

AFFIRMED.

BARNES, ROSE and SEDGWICK, JJ., not sitting.

EDWARD MACGOWAN ET AL., APPELLEES, V. VILLAGE OF
GIBBON, APPELLANT.

FILED DECEMBER 24, 1913. No. 17,514.

1. **Limitation of Actions: MUNICIPAL CORPORATIONS: DETACHING TERRITORY.** The statutory right of the owners of unoccupied territory within a village to petition for its detachment, "whenever" the owners of such unoccupied territory "shall desire to have the same disconnected," is one to which the statute of limitations, as such, does not apply. Comp. St. 1911, ch. 14, art. I, sec. 101.
2. **Municipal Corporations: DETACHING TERRITORY: ESTOPPEL.** By signing a petition for an election to vote municipal bonds, the owner of unoccupied territory in a village does not estop himself to assert his statutory right to have such territory disconnected from the village.
3. **Appeal: AFFIRMANCE.** In a statutory proceeding to disconnect unoccupied territory from a village, the judgment of the district court will be affirmed, "unless it is made to appear that the trial judge committed an important mistake of fact or made an erroneous inference of fact or of law." *Bisenius v. City of Randolph*, 82 Neb. 520.

APPEAL from the district court for Buffalo county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

Thomas F. Hamer, for appellant.

W. D. Oldham and H. M. Sinclair, contra.

ROSE, J.

This is a proceeding to detach agricultural lands of plaintiffs from the village of Gibbon under the statutory provision that owners of unoccupied territory within and adjacent to the corporate limits of any city or village may file in the district court a petition for detachment of such territory. Comp. St. 1911, ch. 14, art. I, sec. 101. The relief sought by plaintiffs is resisted on three grounds: (1) The proceeding is barred by the statute of limitations. (2) A former owner of part of the territory in question signed a petition for an election to vote municipal bonds, and

thereby estopped the present owner, plaintiff from claiming the right to have her lands detached from the village. (3) On the merits of the case plaintiff is not entitled to relief. Upon a trial of the issues the district court found that justice and equity required the detachment of the territory in controversy and granted the prayer of the petition. Defendant has appealed.

1. The territory disconnected had been within corporate limits of the village since 1885. Is defendant entitled to a dismissal on the ground that the proceeding is barred by the statute of limitations? The power to lawfully established boundaries of a municipality to define the terms on which territory may be detached from is legislative. *City of Wahoo v. Dickinson*, 23 Neb. 426; *State v. Dimond*, 44 Neb. 154; *City of East Hansen*, 44 Neb. 704; *Winkler v. City of Hastings*, 121 Neb. 212. In the present case the statutory condition which plaintiffs or petitioners are entitled to relief on if justice and equity require the detachment of their cultural lands from the village of Gibbon. Comp. Stat. ch. 14, art. I, sec. 101. When this condition was to exist, the district court had no alternative, as the statute, in effect, changed the boundaries of the village and declared the severance of the lands of petitioners. It has been held that the district court may inquire into the facts and make such a finding, when the evidence shows the existence of the statutory condition. *City of Wahoo v. Dickinson*, 23 Neb. 426; *Village of Hartington v. City of Wahoo*, 33 Neb. 623; *Bisenius v. City of Randolph*, 82 Neb. 100. The right of the owners of unoccupied territory within the village to assert such a condition is not limited by the village charter to any particular time. On the face of the statute the right continues. Under the specific terms of the village charter, the right to petition for redress may be asserted "whenever" the owners of such unoccupied territory "shall desire to have the same disconnected." Comp. Stat. 1911, ch. 14, art. I, sec. 101. For these reasons the statute of limitations, as such, does not apply.

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2. Should plaintiff Rodgers be denied relief on the ground of estoppel, because a former owner of her land petitioned for an election to vote municipal bonds? In *Barber v. Village of Franklin*, 77 Neb. 91, it is said: "The fact that the party has submitted for some years to municipal taxation from which she was in nowise benefited is not an argument in favor of longer imposing upon her the burden of municipal taxes." Since the voluntary payment of municipal taxes does not prevent the assertion of the right to a severance of agricultural lands, the signing of a petition to vote bonds to be paid by means of taxation should not operate as an estoppel.

3. On the merits of the case the finding of the trial court is clearly right. In any event the rulings below should be sustained under the following rule applicable to this proceeding: "The judgment of the district court will be affirmed, unless it is made to appear that the trial judge committed an important mistake of fact or made an erroneous inference of fact or of law." *Bisenius v. City of Randolph*, 82 Neb. 520.

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

J. W. SHAW ET AL., APPELLANTS, v. GURLEY A. ALEXANDER,
APPELLEE.

FILED DECEMBER 24, 1913. No. 18,133.

1. **Municipal Corporations: ORDINANCES: ENACTMENT: EVIDENCE.** The silence of the record of a village board is not conclusive evidence of the nonexistence of a fact which should be recorded in enacting an ordinance.
2. ———: ———: **PROOF.** The passage of an ordinance may be proved by common law methods, unless otherwise provided by statute.
3. **Intoxicating Liquors: LICENSE: PETITIONERS: RESIDENCE.** The residence of a person, for the purpose of testing his qualifications as a petitioner for a saloon license, is where he has his established

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home, the place where he is habitually present, and to which, when he departs, he intends to return.

4. **Appeal: BRIEFS.** On appeal, an assertion by appellant that the evidence sustains an assignment of error may be disregarded, where no reference is made in his brief to the pages or to the places in the record where such evidence may be found.

APPEAL from the district court for Pawnee county:
JOHN B. RAPER, JUDGE. *Affirmed.*

J. C. Dort, for appellants.

Hazlett & Jack and Walter A. Vasey, contra.

ROSE, J.

The validity of a license authorizing Gurley A. Alexander to sell intoxicating liquors in the village of Table Rock for the municipal year ending May 1, 1914, is assailed in this proceeding. Alexander presented his petition to the village board. Howard P. Young and others filed a remonstrance. After a hearing a license was granted. Remonstrators appealed to the district court, where they were again defeated. By appeal from the judgment sustaining the action of the village board the attack on the license is here renewed.

Remonstrators assert there is no valid ordinance authorizing the issuance of the license and that therefore it is void. Such an ordinance was introduced in evidence, but it is attacked as invalid because the record of the village board fails to show that it was read the third time and passed as required by law. The village board and the district court upheld the ordinance, and it is not affirmatively shown that they were in error. "The silence of the legislative journals is not conclusive evidence of the non-existence of a fact, which ought to be recorded therein, regarding the enactment of a law." *State v. Frank*, 60 Neb. 327; *State v. Dean*, 84 Neb. 344. The passage of an ordinance may be proved by common law methods. *Johnson v. Finley*, 54 Neb. 733; *Van Valkenberg v. Rutherford*,

92 Neb. 803. What is shown by the records of the village board and by other evidence sustains the trial court's ruling.

It is further argued that the license is void because licensee's petition is not signed by 30 resident freeholders of the village. Thirty-three names appear upon the petition. The parties stipulated that 23 of the petitioners were qualified. Among those not included in the stipulation, but who signed the petition, are the following: William Petraska, A. R. Wopata, Steve George, Christina George, James Fritch, Frank L. Fencel, and Mrs. Frank L. Fencel or Mattie Fencel. If the record shows that seven of those named are legal signers, the trial court properly held the petition to be sufficient.

The qualifications of Petraska are clearly shown by the evidence and are not seriously controverted by remonstrators. The same may be said of Wopata.

There is a dispute about the Christian names of the Georges. Remonstrators call them "Sue and Chestney." Licensee says they are "Steve and Christina." The signatures themselves do not decide the controversy, but there is evidence that Steve George and Christina George, who are husband and wife, signed the petition when they owned a lot in Table Rock, and that they have resided there four or five years. The county clerk's certified copy of a recorded deed conveying the lot to them is in the record. It is clearly shown that they are "freeholders" within the meaning of the word as used in the statute. It is asserted that they are Gipsies, and not residents. While it is shown that they have a camping outfit and travel in the summer, and that the husband trades horses, the evidence is direct and positive that their house in Table Rock is furnished the year round, and that they spend their winters there and reside there. The residence of a person is where he has his established home, the place where he is habitually present, and to which, when he departs, he intends to return. *Berry v. Wilcox*, 44 Neb. 82; *Wood v. Roeder*, 45 Neb. 311. Except for proof of the temporary

absence of the Georges and of their mode of life, dence that they reside in Table Rock is uncontradicted is sufficient to show that they are qualified petitioners.

It is conceded that James Fritch is a freeholder. residence is challenged. It is insisted that he resides on a farm in Pawnee county outside of the village. The evidence shows that he has lived in Pawnee county 4½ years, that three days before he signed the petition he bought a home in town, paid for it, and moved into it; that he had spent the nights in town and the days on his farm; that he did not move to town for the purpose of qualifying himself to sign a petition for a license; and that he made up his mind a year before to change his residence from the farm to the village. A banker, who participated in the negotiations for the purchase of the village property, said Fritch had been talking for two years of moving to town. The evidence tending to show Fritch's intention to reside in Table Rock, where he in fact moved, is a conviction.

Frank L. Fencil and wife seem to be challenged because they were not freeholders when they signed the petition and because they acquired title to real estate for the purpose of qualifying themselves as petitioners for a license. Remonstrators make no reference to the places in the record where evidence relating to the issues may be found, though the testimony is voluminous. In this respect there is disregard of court rules. The circumstances, time to which other litigants are entitled will not be devoted to the sifting of a large volume of testimony to see if the assertions of remonstrators are correct and if the judgment of the trial court is erroneous.

The 23 petitioners to which no objections were made and the 7 others named make the 30—the requisite number. A place in the record containing error has not been pointed out. The judgment below is therefore

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

ASHER D. WARNER, APPELLANT, v. MICHAEL CAVEY ET AL.,
APPELLEES.

FILED DECEMBER 24, 1913. No. 18,270.

1. **Highways: OPENING: SECTION LINES.** Section lines are by statute declared to be public roads which may be opened by the county board whenever the public good requires it. Comp. St. 1911, ch. 78, sec. 46.
2. ———: ———: **DISCRETION OF COUNTY BOARD: REVIEW.** "The propriety or necessity of opening and working a section-line road is committed to the discretion of the county board, and its decision is not subject to review." *Howard v. Supervisors*, 54 Neb. 443.
3. ———: ———: ———: **COMPENSATION FOR DAMAGES.** The only limitation upon the discretion of the county board in respect to opening section-line roads is the fundamental one of compensation for private property taken or damaged. *Rose v. Washington County*, 42 Neb. 1.
4. ———: ———: ———. A county board may open a highway in the form of a *cul-de-sac* on a section line.

APPEAL from the district court for Boone county: CONRAD HOLLENBECK, JUDGE. *Affirmed.*

H. C. Vail, for appellant.

W. J. Donahue, contra.

ROSE, J.

This is a suit for an injunction to prevent the members of the county board of Boone county and a road overseer from carrying out threats to open a road running east and west for half a mile on the section line between the west halves of sections 21 and 28, in township 20, Boone county. Plaintiff owns land south of that part of the section line described and also the 40-acre tract with its southeast corner at the western terminus of the proposed road. The relief sought is based on allegations that the road, if opened, would be a *cul-de-sac* with the west end terminating at private property, and that therefore the road would

be a private one, for which the property of plaintiff not lawfully be taken without his consent. To the defendants demurred. The demurrer was sustained from a judgment of dismissal plaintiff has appealed.

The ruling on the demurrer is not erroneous. Plaintiff pleads that defendants are threatening to open a road section line, and fails to allege that resulting damages have not been ascertained or paid or tendered. Section lines are by statute declared to be public roads which be opened by the county board whenever the public requires it. Comp. St., ch. 78, sec. 46. This provision by construction a part of the contract under which plaintiff acquired title to his lands. A court of equity will not hold, contrary to a specific legislative enactment, a section line, when regularly opened and improved for public travel, is not a highway. The county board is required to open at one time, pursuant to a single order, a section-line road a mile or more in length. Expenses for bridges may be required at different places. The damages and the cost of construction are burdens which may properly be assumed at different times. Next year, or at a later time, the county board may, in its discretion, close the road in controversy until it connects with another public highway on the west. Under the statute and previous decisions the law is: "The propriety or necessity of opening and working a section-line road is committed to the discretion of the county board, and its decision is not subject to review." *Howard v. Supervisors*, 54 Neb. 442. The only limitation upon the discretion of the county board with respect to opening section-line roads is the fundamental one of compensation for private property taken or damaged. *Rose v. Washington County*, 42 Neb. 1. The county board's power and discretion having been thus determined, the following language from a text-book correctly states the rule applicable to the present controversy: "County commissioners having authority to establish highways, in a proper case, establish a highway which is a public road." 1 Elliott, Roads (3d ed.) sec. 2.

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Plaintiff, under his own petition, is not entitled to an injunction, and his case was properly dismissed.

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

JULES ALTHAUS V. STATE OF NEBRASKA.

FILED DECEMBER 24, 1913. No. 18,281.

Constitutional Law: CHATTEL LOANS ACT. The act providing that "A rate of interest not exceeding one per cent. per month may be charged by agreement on loans not exceeding \$250, made for a period of one year or less, where such loans are secured only by a chattel mortgage on household goods, musical instruments, wearing apparel, jewelry, diamonds, or by a deposit of personal property, or by an assignment of wages, credits, or choses in action," and providing penalties for exacting excessive interest and for otherwise violating the act, is void, because it violates the constitutional provision prohibiting the legislature from passing local or special laws regulating the interest on money. Laws 1913, ch. 250; Const., art. III, sec. 15.

ERROR to the district court for Douglas county: ABRAHAM L. SUTTON, JUDGE. *Reversed and dismissed.*

Smyth, Smith & Schall, for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton*, contra.

ROSE, J.

In a prosecution by the state in the district court for Douglas county, Jules Althaus was convicted of violating the legislative enactment providing that "A rate of interest not exceeding one per cent. per month may be charged by agreement on loans not exceeding \$250, made for a period of one year or less, where such loans are secured

only by a chattel mortgage on household goods, on instruments, wearing apparel, jewelry, diamonds, or deposit of personal property, or by an assignment of wages, credits, or choses in action," and provide penalties for exacting excessive interest and for other violations of the act. Laws 1913, ch. 250. For the offense described the defendant was sentenced to pay a fine of \$100. As plaintiff in error he now presents for review the case of his conviction.

Defendant takes the position that the judgment is erroneous, because the legislative act under which he was charged, convicted and sentenced is unconstitutional and void. A specific objection to the act is that it violates the constitutional provision prohibiting the legislature from passing local or special laws regulating the interest on money. Const., art. III, sec. 15. One purpose of the constitution is to require general laws operating alike upon similar rights and upon all persons of a class, and to prevent legislation affecting diversely property of like character and persons similarly situated. The wisdom of the constitutional provision is not open to controversy. It is out of the equal protection of the laws to which all are entitled would be lost. To respect that part of the supreme law prohibiting special or class legislation and to secure the utmost legislative freedom consistent with constitutional limitations, the following doctrine was announced in an opinion by Judge SULLIVAN: "The rule established by the authorities is that, while it is competent for the legislature to classify, the classification, to be valid, must rest on some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects classified." *State v. Farmers Merchants Irrigation Co.*, 59 Neb. 1.

Tested by this rule, does the act legalizing a rate of interest not exceeding one per cent. a month on loans of \$100 or less, where they "are secured only by a chattel mortgage on household goods, musical instruments, wear-

EDWARD MACGOWAN ET AL., APPELLEES, V. VILLAGE OF
GIBBON, APPELLANT.

FILED DECEMBER 24, 1913. No. 17,514.

1. **Limitation of Actions: MUNICIPAL CORPORATIONS: DETACHING TERRITORY.** The statutory right of the owners of unoccupied territory within a village to petition for its detachment, "whenever" the owners of such unoccupied territory "shall desire to have the same disconnected," is one to which the statute of limitations, as such, does not apply. Comp. St. 1911, ch. 14, art. I, sec. 101.
2. **Municipal Corporations: DETACHING TERRITORY: ESTOPPEL.** By signing a petition for an election to vote municipal bonds, the owner of unoccupied territory in a village does not estop himself to assert his statutory right to have such territory disconnected from the village.
3. **Appeal: AFFIRMANCE.** In a statutory proceeding to disconnect unoccupied territory from a village, the judgment of the district court will be affirmed, "unless it is made to appear that the trial judge committed an important mistake of fact or made an erroneous inference of fact or of law." *Bisentus v. City of Randolph*, 82 Neb. 520.

APPEAL from the district court for Buffalo county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

Thomas F. Hamer, for appellant.

W. D. Oldham and H. M. Sinclair, contra.

ROSE, J.

This is a proceeding to detach agricultural lands of plaintiffs from the village of Gibbon under the statutory provision that owners of unoccupied territory within and adjacent to the corporate limits of any city or village may file in the district court a petition for detachment of such territory. Comp. St. 1911, ch. 14, art. I, sec. 101. The relief sought by plaintiffs is resisted on three grounds: (1) The proceeding is barred by the statute of limitations. (2) A former owner of part of the territory in question signed a petition for an election to vote municipal bonds, and

thereby estopped the present owner, plaintiff Ro from claiming the right to have her lands detached the village. (3) On the merits of the case plaintiff not entitled to relief. Upon a trial of the issues the district court found that justice and equity required the detachment of the territory in controversy and granted prayer of the petition. Defendant has appealed.

1. The territory disconnected had been within the corporate limits of the village since 1885. Is defendant entitled to a dismissal on the ground that the proceeding is barred by the statute of limitations? The power to change lawfully established boundaries of a municipality and to define the terms on which territory may be detached from it is legislative. *City of Wahoo v. Dickinson*, 23 Neb. 426; *State v. Dimond*, 44 Neb. 154; *City of Hastings v. Hansen*, 44 Neb. 704; *Winkler v. City of Hastings*, 85 Neb. 212. In the present case the statutory condition under which plaintiffs or petitioners are entitled to relief is that justice and equity require the detachment of their cultural lands from the village of Gibbon. Comp. St. Neb. ch. 14, art. I, sec. 101. When this condition was found to exist, the district court had no alternative, and the statute, in effect, changed the boundaries of the village and declared the severance of the lands of petitioners. It has been held that the district court may inquire into the facts and make such a finding, when the evidence shows the existence of the statutory condition. *City of Wahoo v. Dickinson*, 23 Neb. 426; *Village of Hartington v. State*, 33 Neb. 623; *Bisenius v. City of Randolph*, 82 Neb. 212. The right of the owners of unoccupied territory within the village to assert such a condition is not limited by the village charter to any particular time. On the face of the statute the right continues. Under the specific terms of the village charter, the right to petition for redress may be asserted "whenever" the owners of such unoccupied territory "shall desire to have the same disconnected." Comp. St. 1911, ch. 14, art. I, sec. 101. For these reasons the statute of limitations, as such, does not apply.

Shaw v. Alexander.

2. Should plaintiff Rodgers be denied relief on the ground of estoppel, because a former owner of her land petitioned for an election to vote municipal bonds? In *Barber v. Village of Franklin*, 77 Neb. 91, it is said: "The fact that the party has submitted for some years to municipal taxation from which she was in nowise benefited is not an argument in favor of longer imposing upon her the burden of municipal taxes." Since the voluntary payment of municipal taxes does not prevent the assertion of the right to a severance of agricultural lands, the signing of a petition to vote bonds to be paid by means of taxation should not operate as an estoppel.

3. On the merits of the case the finding of the trial court is clearly right. In any event the rulings below should be sustained under the following rule applicable to this proceeding: "The judgment of the district court will be affirmed, unless it is made to appear that the trial judge committed an important mistake of fact or made an erroneous inference of fact or of law." *Bisenius v. City of Randolph*, 82 Neb. 520.

AFFIRMED.

LETON, FAWCETT and HAMER, JJ., not sitting.

J. W. SHAW ET AL., APPELLANTS, v. GURLEY A. ALEXANDER,
APPELLEE.

FILED DECEMBER 24, 1913. No. 18,133.

1. Municipal Corporations: ORDINANCES: ENACTMENT: EVIDENCE. The silence of the record of a village board is not conclusive evidence of the nonexistence of a fact which should be recorded in enacting an ordinance.
 2. ———: ———: PROOF. The passage of an ordinance may be proved by common law methods, unless otherwise provided by statute.
 3. Intoxicating Liquors: LICENSE: PETITIONERS: RESIDENCE. The residence of a person, for the purpose of testing his qualifications as a petitioner for a saloon license, is where he has his established
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Shaw v. Alexander.

home, the place where he is habitually present, and to which he departs, he intends to return.

4. **Appeal: BRIEFS.** On appeal, an assertion by appellant that evidence sustains an assignment of error may be disregarded if no reference is made in his brief to the pages or to the part of the record where such evidence may be found.

APPEAL from the district court for Pawnee county.
JOHN B. RAPER, JUDGE. *Affirmed.*

J. C. Dort, for appellants.

Hazlett & Jack and Walter A. Vasey, contra.

ROSE, J.

The validity of a license authorizing Gurley A. Alexander to sell intoxicating liquors in the village of Rock for the municipal year ending May 1, 1914, is in issue in this proceeding. Alexander presented his petition to the village board. Howard P. Young and others filed a remonstrance. After a hearing a license was granted. Remonstrators appealed to the district court, where they were again defeated. By appeal from the judgment sustaining the action of the village board the attack on the license is here renewed.

Remonstrators assert there is no valid ordinance authorizing the issuance of the license and that therefore it is void. Such an ordinance was introduced in evidence but it is attacked as invalid because the record of the village board fails to show that it was read the third time and passed as required by law. The village board and the district court upheld the ordinance, and it is not affirmatively shown that they were in error. "The silence of legislative journals is not conclusive evidence of the existence of a fact, which ought to be recorded there regarding the enactment of a law." *State v. Franke*, 84 Neb. 327; *State v. Dean*, 84 Neb. 344. The passage of an ordinance may be proved by common law methods. *Johnson v. Finley*, 54 Neb. 733; *Van Valkenberg v. Ruthen*

2. **Constitutional Law: POWER OF LEGISLATURE: POLICE POWER.** Statutes enacted by the legislature in the exercise of the police power must not violate rights guaranteed to the people by the constitution. The legislature may not under the guise of protecting public interests arbitrarily interfere with private business.
3. **Courts: JURISDICTION: LEGISLATIVE ENACTMENTS: "GIFT ENTERPRISE."** And the fact that the legislature, in an act making it a criminal offense for any person to engage in any gift enterprise, describes a legitimate private business enterprise, and provides that any person engaged in such business shall be held to be engaged in a gift enterprise within the provisions of the act, will not oust the jurisdiction of the courts to determine the true character of the business so attempted to be prohibited.
4. **Constitutional Law: POWER OF LEGISLATURE: POLICE POWER.** Chapter 179, laws 1911, set out in the opinion, in so far as it might be construed to prohibit the business of giving and redeeming what are commonly known as "trading stamps," is an unreasonable interference with a lawful business, not within the police power of the legislature, and is in conflict with article I of the Bill of Rights and the fourteenth amendment to the Federal Constitution.

APPEAL from the district court for Adams county:
HARRY S. DUNGAN, JUDGE. *Reversed and dismissed.*

Frank P. Wolcott, Talbot & Allen and Tibbets, Morey & Fuller, for appellant.

J. W. James, M. A. Hartigan and Don C. Fouts, contra.

FAWCETT, J.

The relator, the county attorney for Adams county, instituted proceedings in *quo warranto* in the district court for that county, to oust the respondent from the state of Nebraska, and from a judgment of ouster the respondent appeals.

The pleadings, consisting of the amended information, the answer and reply, are voluminous and will not be set out. A reference to the real points in issue will be sufficient. The judgment of ouster was based solely on the following findings:

"The court further finds that on August 25, 1911, after

the respondent had been doing business in the Nebraska for three or more years without having an occupation tax, it appeared before the secretary of state and filed with him a statement that it was delinquent under the law and that it wished to be reinstated. The court further finds that at the time it complied with the law on this subject in all respects, except that it failed to pay a sufficient amount as an occupation tax, as hereinafter more specifically set forth; that it paid an occupation tax, together with \$10 penalty, for the year ending June 30, 1910, and was thereupon reinstated; on the same day the respondent paid to the secretary of state a \$10 occupation fee and \$10 penalty for reinstatement to cover the year ending June 30, 1911; that on the same day respondent paid to the secretary of state to cover the occupation permit for the year ending June 30, 1912, and that subsequently the respondent paid to the secretary of state \$100, being the occupation tax for the year ending June 30, 1913. The court further finds that said respondent at the time of its application for reinstatement and upon the payment of the sums heretofore set forth was thereupon duly reinstated by the secretary of state. The court further finds that under the law respondent should have paid \$100 for each of the years which it paid only \$10, and that the respondent, therefore, in this respect failed to comply with section 12031, Cobbey's Statutes of 1911. The court further finds that at the time of reinstatement of the respondent by the secretary of state such corporation was in default under section 12031, Cobbey's Statutes of 1911, providing for the filing of a report with the attorney general of the state of Nebraska. The court, therefore, finds that the respondent, by reason of having neglected to comply with the requirements of the statute relative to foreign corporations above set forth, has forfeited its rights to do business in the state of Nebraska, and is now wrongfully doing business in this state, and that it should be ousted therefrom.

In deciding the case upon these findings, the court

nored the main ground upon which relator seeks to oust the respondent, viz., that the business in which respondent is engaged is prohibited by chapter 179, laws 1911. That relator considers this the main ground, and the only one which would permanently give the full relief he seeks, is shown by the fact that his counsel, in his brief, by not discussing, practically abandons all of the other grounds of complaint set out in his amended information, and directs his argument wholly to the constitutionality of this act.

The record shows that at the time respondent was reinstated it paid to the secretary of state the full amount of occupation tax and penalty demanded by the secretary for each of the years named, and by its answer it alleges that it "is willing and desirous and stands ready to comply with all and every lawful provision of the statutes of said state." The fact, if it be a fact, that the secretary of state may have erred as to the amount required to entitle respondent to reinstatement is not sufficient to sustain a judgment of ouster, and especially so when respondent was before the court offering to fully comply with every statutory requirement. The record also shows the filing by respondent of its reports with the attorney general. The court, therefore, erred in its findings upon which it based its judgment.

We might rest here, and remand the case for further proceedings, but, as such a course would not end the litigation, we have concluded to consider the main question, which has been so ably argued by counsel on both sides in their briefs and at the bar.

Chapter 179, *supra*, is as follows: "An act to prohibit gift enterprises and to provide punishment for a violation of the same.

"Section 1. (Gift Enterprise.) It shall be unlawful for any person or persons to engage in any gift enterprise in this state. Every person who shall sell or offer for sale any real estate or article of merchandise of any description whatever, or any ticket of admission to any exhibition

or performance, or other place of amusement, with promise, expressed or implied, to give or bestow, or in any manner hold out the promise of gift or bestowal of article or thing, for and in consideration of the purchase by any person of any other article or thing, whether the object shall be for individual gain or for the benefit of any institution of whatever character, or for any purpose whatever, shall be held to be engaged in a gift enterprise within the provisions of this act.

"Section 2. (Same—Penalty.) Any person or persons who shall engage in any gift enterprise in this state shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not exceeding five hundred dollars, or imprisoned in the county jail not exceeding six months, or both, at the discretion of the court.

The amended information alleges substantially that respondent is conducting a gift enterprise at Hastings, Nebraska; that the method of conducting its business is to hold out the promise of a gift or bestowal of certain trading stamps to any person who purchases goods, and their redemption at its place of business, for the benefit of a certain institution, to wit, Stein Brothers, with the intent of building up and maintaining a monopoly and obstructing open competition; that Stein Brothers conduct clothing, grocery, millinery and furniture departments; that respondent and Stein Brothers have been and are now engaged in the violation of this act. The method of issuing trading stamps by merchants to their customers and of their redemption by the trading stamp company is a matter of common knowledge and need not be detailed here. The business has grown to enormous proportions and is now being carried on in practically every state in the Union. As a result of present day agitation along the line of what some of the courts have characterized as governmental paternalism, the legislatures of many states have been induced to pass laws substantially similar to the one under consideration here. While they differ somewhat in phraseology, they are,

we have said, substantially the same. A reading of them will show that, while their real purpose is attempted to be concealed in the language used, it is apparent that such real purpose is to abolish the trading stamp system as a method of advertising by retail merchants. The question is: Is it within the power of the legislature to do so? The police power of the state has in recent years, at the demand of a persistent and in many cases an aggrieved public, been greatly extended by judicial construction; but the courts have not yet, except in very few instances, gone so far as to hold that under this power a legislature may forbid contracts which have always been held to be within the constitutional right of persons in every state to possess and acquire property, to transact legitimate business, and to fully enjoy freedom of contract in relation thereto.

In considering a similar statute, in *Young v. Commonwealth*, 101 Va. 853, 867, a case in which the business of the respondent here was being considered, it is said: "The act, as we construe it, prohibits a person from selling a given article, and at the same time, and as a part of the transaction, giving to the purchaser a stamp, coupon, or other device which will entitle him to receive from some third person some other well-defined article in addition to the one sold. This is equivalent to declaring that it is illegal for a man to give away one article as a premium to the buyer for having purchased another; for, as already intimated, it can make no possible difference that the article given away with the sale is delivered to the purchaser by a third person instead of the seller himself. We think it is clear that such a prohibition is an unwarranted interference with the individual liberty which is guaranteed to every citizen, both by our state constitution and also by the fourteenth amendment to the constitution of the United States. * * * This inalienable right is trespassed upon and impaired whenever the legislature prohibits a man from carrying on his business in his own way, provided always, of course, that the business and the mode of carrying it on are not injurious to the public, and

provided also that it is not a business which is with the public use or interest.' * * * In the bar the element of chance or lottery is entirely. There is no uncertainty or indefiniteness about miums. The articles are certain and fixed. They constantly on exhibition, so that the person about lect a book of 990 stamps has full opportunity to in his mind what article he will select from the stor trading stamp company when he is ready to have l of stamps redeemed. From the facts certified it that the articles for the redemption of stamps are bition at the store of the company, that the custom bought the tomatoes and received the stamps knew t the advertisements of the company that the defenda the stamps with all cash sales, and for that reas chased from the defendant in preference to some m who did not give the stamps; and that said custome the general value and character of the articles from he would be entitled to have his selection in redemp stamps collected by him. We can find nothing in t tract between the Sperry & Hutchinson Company a defendant, nor the transactions with customers in ance of such contract, that is not a legitimate exer one's right to prosecute his business in his own wa already said, 'it appears to be simply one of the ma vices fallen upon in these days of sharp competi tween trades people' to attract customers, or to those who have bought once to buy again, and in t spect is as innocent as any other of the many forms vertising. * * * Indulging every possible presun in favor of the validity of the statute now under cons tion, we are constrained to the conclusion, upon r and authority, that it is not a valid exercise of legis power. It attempts to prohibit and restrain the defe in the lawful prosecution of a lawful business."

In April, 1911, the legislature of the state of Mass setts, under a practice prevailing in that state, subm to the supreme court a bill prohibiting gift enterp

with this interrogatory: "Would the provisions of the bill now pending in the general court, which prohibits gift enterprises, being House Bill No. 1097, a copy of which is transmitted herewith, be constitutional if enacted?" To this the chief justice and the six associate justices of that court, in *Opinion of the Justices*, 208 Mass. 607, gave the following answer:

"We, the justices of the supreme judicial court, having considered the question upon which our opinion is required under the order of April 4, 1911, a copy of which is hereto annexed, are constrained to answer it in the negative. The principles applicable to statutes of this kind were considered and discussed in *Commonwealth v. Emerson*, 165 Mass. 146, *Commonwealth v. Sisson*, 178 Mass. 578, and *O'Keeffe v. Somerville*, 190 Mass. 110. In the last of these cases a statute was held unconstitutional in part upon grounds which are equally applicable to the house bill referred to in the order, and which require us to hold that the provisions of this bill are unconstitutional.

"The bill is drawn in broad terms, and it purports to forbid transactions that are not different in principle from contracts of sale which always have been held to be within the constitutional right of persons in every state to possess and acquire property, to transact legitimate business, and to buy and sell and get gain. * * * There is nothing in the conduct proposed to be prohibited that necessarily appeals to the gambling instinct or involves any element of chance. Such statutes and ordinances have been held unconstitutional by the highest courts in a large number of states. (Citing an unusually large number of cases from many states.)

"The court of appeals of the District of Columbia, in its decisions in *Lansburgh v. District of Columbia*, 11 App. Cas. D. C. 512, and in *District of Columbia v. Gregory*, 35 App. Cas. D. C. 271, stands almost alone, although it has been followed by one or two federal judges, in reaching an opposite conclusion." To that opinion the court attached the following syllabus: "A statute making it a

criminal offense to engage in any gift enterprise providing that a person who in any manner holds promise of gift or bestowal of any article or thing for in consideration of the purchase by any person of a thing shall be deemed to be engaging in a gift enterprise within the meaning of the statute, would be constitutional." In addition to the many cases there holding in harmony therewith, we add *Leonard v. Eddale*, 46 Wash. 301; *Territory of Hawaii v. Gunst*, 18 Hawaii, 196.

As opposed to this formidable array of authority the respondent is compelled to rely upon *Lansburgh v. District of Columbia*, *supra*, *State v. Hawkins*, 95 Md. 133, *Humes v. City of Ft. Smith*, 93 Fed. 857, the last being an opinion by a district judge. As against the last case the respondent cites *Humes v. City of Little Rock*, 138 Fed. 100, the opinion being by another district judge in the state. *State v. Hawkins*, *supra*, is completely destroyed as an authority in this case by *State v. Caspare*, 115 Mo. 80 Atl. 606, in which case the Maryland court gets squarely in line with the many other states cited and follows the supreme court of Massachusetts.

We deem it unnecessary to prolong this opinion, as the reasoning in support of our conclusion exhaustively appears in many of the cases cited by the Massachusetts court. The reasoning of those cases compels our concurrence. We therefore hold that chapter 179, *supra*, in far as it might be construed to prohibit the business which the respondent is engaged, is in conflict with article I of the Bill of Rights, and the fourteenth amendment of the Federal Constitution.

The judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

ROSE, J., dissents.

GEORGE CONROY ET AL., APPELLEES, v. FLORENTIUS M.
HALLOWELL, APPELLANT.

FILED DECEMBER 24, 1913. No. 18,176.

County Judges: REMOVAL FROM OFFICE. The only method of removing a county judge from office in this state is by impeachment, as provided in section 14, art. III of the constitution.

APPEAL from the district court for Buffalo county:
JAMES R. HANNA, JUDGE. *Reversed and dismissed.*

*H. M. Sinclair, W. D. Oldham, Thomas F. Hamer and
John A. Miller, for appellant.*

*Edward B. McDermott, Charles G. Ryan and Ralph R.
Horth, contra.*

FAWCETT, J.

From a judgment of the district court for Buffalo county, removing appellant, who will be referred to as defendant, from the office of county judge of that county, he prosecutes this appeal.

The action was instituted by appellees, who will be designated as plaintiffs, to remove defendant from his office for causes enumerated in section 1, art. II, ch. 18, Comp. St. 1911. The district court, by consent of parties, referred the case to Honorable T. O. C. Harrison to take testimony and report findings of fact and conclusions of law. The findings of fact and conclusions of law by the referee were adverse to defendant. No proper bill of exceptions of the evidence taken before the referee has been preserved in the record. The case must therefore be determined purely upon the questions of law raised by the motion for a new trial and assigned here, one of which is that the district court is without jurisdiction to remove a county judge; in other words, that the statute, under which the complaint was filed and prosecuted, in so far as it permitted the removal of a county judge for any

other offenses than those enumerated in the constitution, and in any other manner than by impeachment as provided in the constitution, is void.

Section 1 of the act referred to provided: "All county officers, including justices of the peace, may be charged, tried, and removed from office for official misdemeanors in the manner and for the causes following: *First*. For habitual or wilful neglect of duty. *Second*. For gross partiality. *Third*. For oppression. *Fourth*. For extortion. *Fifth*. For corruption. *Sixth*. For wilful maladministration in office. *Seventh*. For conviction of a felony. *Eighth*. For habitual drunkenness." Section 2 provided: "Any person may make such charge, and the district court shall have exclusive original jurisdiction thereof by summons." Section 3 provided that the proceedings should be as nearly like those in other actions as the nature of the case would admit of. Section 4 provided that the complaint should be by "an accuser against the accused," and should contain the charges with the necessary specifications, and be verified by the affidavit of any elector of the state. Section 5 provided that it would be sufficient that the summons require the accused to appear and answer a complaint for "official misdemeanor;" and that a copy of the complaint must be served with the summons. Section 6 provided that no answer or other pleading after the complaint is necessary, but that the defendant might move to reject the complaint or demur thereto upon any ground rendering such motion or demurrer proper. Section 7 provided that the questions of fact should be tried as any other action, and if the accused should be found guilty judgment should be entered removing him from his office and declaring the office vacant. This act was adopted in 1866. Turning to the constitution of 1866, we find the following provisions:

Section 28, art. II, provided: "The house of representatives shall have the sole power of impeachment, but a majority of the members elected must concur therein. Impeachments shall be tried by the senate; and the senators,

when sitting for that purpose, shall be upon oath or affirmation to do justice according to law and evidence. No person shall be convicted without the concurrence of two-thirds of the senators."

Section 29 provided: "The governor, secretary of state, auditor, treasurer, and judges of the supreme and district courts, shall be liable to impeachment for any misdemeanor in office; but judgment in such cases shall extend only to removal from office, and disqualification to hold any office of honor, trust or profit, under this state; but the party convicted or acquitted shall nevertheless be liable to indictment, trial and punishment, according to law. All other civil officers shall be tried for misdemeanors in office in such manner as the legislature may provide."

Section 31 provided: "The legislature may declare the cases in which any office shall be deemed vacant, and also the manner of filling the vacancy where no provision is made for that purpose in this constitution."

In *Brittle v. People*, 2 Neb. 198, 211, Mr. Justice CROUNSE gives us a little inside information as to the birth of this constitution: "As is well known, the constitution was originally drafted in a lawyer's office by a few self-appointed individuals. These importuned the legislature then sitting to submit it to a vote of the people." On page 214, in speaking of the matter again, the learned justice said: "Yet we have seen that it was born in a law office, instead of a convention; that it was made by no one under any authority whatever; and that it might as well have been made by any one else as by those who did draft it. Again, we have noted that it was submitted by nobody lawfully empowered to do so; that no one was obliged to vote, and no one could be punished for voting a thousand ballots at the pretended election. And we have further seen that, whether carried by a majority vote in fact or not, we are nevertheless a state working under the constitution so voted for." It is not surprising that the people were not satisfied with a constitution drafted, submitted, and voted for under the conditions above outlined,

and in the short period of six years thereafter cured the adoption of a new constitution, prep constitutional convention composed of many of men in the state, a few of whom are still living an ing honor upon our commonwealth, notably ou Chief Justice M. B. REESE; the president of tha tion, Honorable John Lee Webster; United States Judge William H. Munger, and Governor O. A As a result of the careful and extended deliber this convention, the constitution of 1875 was dra mitted to a vote of the people, and duly adopted.

It will be conceded on all sides that there was flict between the statute set out and the quoted p of the constitution of 1866; and the important involved is what change, if any, was made by the tion of 1875? To that point we now direct our a Further reference to sections of the constitution to the constitution of 1875.

Section 18, art. XVI, provides: "If this constib adopted the existing constitution shall cease in all visions on the first day of November, A. D. 1871 *Wheeler v. City of Plattsmouth*, 7 Neb. 270, in cons that section, we held: "The old constitution dic *cease in all its provisions*, and must be considered, as to transactions past and closed, as if it never e:

Section 1, art. VI, provides: "The judicial po this state shall be vested in a supreme court, district county courts, justices of the peace, police magis and in such other courts inferior to the district co may be created by law for cities and incorporated t

Section 4, art. X, provides: "The legislature sha vide by law for the election of such county and to officers as may be necessary."

Section 13, art. XVI, provides: "The general el of this state shall be held on the Tuesday succeedi first Monday of November of each year, except th general election, which shall be on the second Tues October, 1875. All state, district, county, precine

part of the judicial system of the state; and, while a county judge may be a county officer in the sense that he is an officer elected by the voters of a single county, he is not a county officer as contemplated by the framers of the constitution and within the meaning of that instrument. By section 13, art. XVI, above quoted, this distinction will be seen standing out very clearly. It is there declared: "Judges of the supreme, district and county courts, all elective county and precinct officers, and all other elective officers," etc. Here the county courts are distinctly segregated from "*all elective county*" officers. Again, in section 14 it is provided: "The terms of office of *all* state and *county* officers, of judges of the supreme, district and *county* courts," etc., showing, as clearly as language can make it appear, it seems to us, that county courts are in a class with supreme and district courts, and are not to be considered as classed with "county officers."

If we are right in this, then how can such officers be removed? Has the constitution provided for their removal and determined how their offices shall become vacant? The answer must be in the affirmative. The provision of section 29, art. II of the constitution of 1866, *supra*, that the governor, secretary of state, auditor, treasurer, and judges of the supreme and district courts should be liable to impeachment, and that all other civil officers should be tried for misdemeanors in office in such manner as the legislature may provide, is completely superseded by sections 14 and 20, art. III, and section 5, art. V, of our present constitution. It will be seen that section 5, art. V, adds to the causes for impeachment specified in section 20, art. III, the additional cause of "misdemeanor in office." This general term is broad enough to cover any cause set forth in section 1, art. II, ch. 18, *supra*, and it is significant that the framers of the constitution added this general cause, so as to cover every kind and character of maladministration in office, but adhered to the method of removal, viz., by impeachment. Having provided, fully, by section 20, art. III, and section 5, art. V, the grounds

upon which a constitutional office may become vacant, we do not think it is within the power of the legislature to add any other or additional grounds; and, having provided the manner in which the office shall be declared vacant, viz., by impeachment of its incumbent, it is not within the power of the legislature to provide for any other or different method of removal. If this be not so, then the legislature may by statutory enactment provide that the governor, or any other state officer, may be put upon trial upon the accusation of any individual elector, upon some ground other than contemplated by the constitution, and before the district court, and compel him to defend his right to his office upon such complaint, based, it may be, upon prejudice, or prompted by a desire for revenge, instead of giving the official, who has been elected by the people, the right to hold his office until the legislature in joint convention assembled has deliberately decided, by a majority vote of all the members elected, that he should be put upon his trial, and that when so put upon trial it should be in the supreme court. That there are a few cases inferentially holding that way, we concede; but the weight of authority and the better reasoning are to the contrary.

It is claimed that this court has adopted the other view in *State v. Lansing*, 46 Neb. 514, 530. This claim is not well founded. The facts in that case are: In 1891 Lansing was elected county judge of Lancaster county and duly qualified and discharged the duties of his office for the full term. At the general election in 1893 he was re-elected and a certificate of election issued to him, but he did not execute an official bond and file the same in the office of the county clerk within the time required by law. The relator charged that, by reason of his failure to so file his bond, together with his oath of office, the office had become vacant. At the election of 1894, which would be during the middle of that term, the relator was a candidate for election to fill the vacancy. The section of the statute which Judge Lansing failed to comply with provides: "Official

bonds, with the oath indorsed thereon, shall be filed in the proper office within the times as follows: Of all officers elected at any general election on or before the first Thursday after the first Tuesday in January next, succeeding the election." Comp. St. 1891, ch. 10, sec. 5. Section 15 of the chapter provides: "If any person elected or appointed to any office shall neglect to have his official bond executed and approved as provided by law, and filed for record within the time limited by this act, his office shall thereupon *ipso facto* become vacant, and such vacancy shall thereupon immediately be filled by election or appointment as the law may direct in other cases of vacancy in the same office." Section 17 provides: "When the incumbent of an office is re-elected or re-appointed he shall qualify by taking the oath and giving the bond as above directed." Judge Lansing failed to file his bond and oath on or before the first Thursday after the first Tuesday in January, 1894, but did file the same on January 25, and the question involved in that case was whether the office thereby became vacant. The district court sustained a general demurrer to the information and entered judgment for the respondent. This court reversed the judgment and remanded the case. The learned commissioner who wrote the opinion, in his customary scholarly manner, considered the questions actually involved in the case before the court, and then on page 530 indulged in the dictum upon which plaintiffs now rely for an affirmance of this case. At the page indicated, section 20, article III of the constitution, is quoted, and the commissioner then says: "It is contended that the expression of these events as creating vacancies is the exclusion of all others, and there are a few decisions in other states lending color to the argument. It would be a sufficient answer to this contention to say that this court has always carried in view the principle that the state constitution is not to be considered as a grant of power, but that its provisions are purely restrictive and that legislation is valid unless prohibited by the state or the federal constitution. Therefore, in such cases

as the present, the maxim '*Expressio unius est exclusio alterius*' is not applicable, and the legislature may adopt any provision not prohibited by the constitution. (Citing cases.) To put it differently, the constitutional provision quoted creates a vacancy upon the happening of any of the events covered by the provision, and the legislature would be prohibited by that provision from enacting any law whereby such an event would not create a vacancy. But it is not prohibited from enacting that vacancies shall be otherwise created." The language of the commissioner immediately following what we have quoted shows that what was above said is pure dictum, viz.: "But aside from this, section 20, article III of the constitution, manifestly refers to events occurring after an induction into office. The case presented is not one of that character. It is not the case of ousting one already legally inducted into office for events occurring after his induction, but, on the contrary, it is questioning the right of one to claim an office in the beginning. The distinction has already been alluded to, but throughout it should be borne in mind that we are here discussing the right of a person to claim a term of office, and not the right of another or of the public to oust one from a term already legally begun." What was said by the learned commissioner in the discussion above set out was in all probability not the result of careful deliberation, nor was it said in a case where the question was involved, and in which he had been favored with the assistance of counsel in argument, as we have been in this case. The reasoning of the commissioner does not apply because, as we have shown, the legislature has not added any additional cause, but all causes specified in the statute under which these proceedings are being prosecuted are covered by section 5, article V of the constitution, above set out. Moreover, if this dictum were permitted to stand as a holding of the court it would not be decisive of the present case, for the reason that it goes no further than to hold that the legislature might add to the causes for removal fixed by the constitution, and does not in any man-

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ner attempt to discuss or decide the mode of removal for any added cause. A careful consideration of the dictum quoted satisfies us that it is unsound when attempted to be squared by the several provisions of our constitution above set out.

Plaintiffs also place reliance in *Donahue v. County of Will*, 100 Ill. 94, which, they insist, was approved and followed in *State v. Oleson*, 15 Neb. 247. The office involved in *Donahue v. County of Will* was the office of county treasurer, and that involved in *State v. Oleson* county sheriff. For the reasons which we have set out in this opinion, we think a clear distinction must be drawn between the office of county judge and county offices properly so called. But even as applied to the office of county sheriff, the opinion in *State v. Oleson* was written with grave misgivings as to the soundness of the holding in *Donahue v. County of Will*. The opinion by Mr. Chief Justice COBB, in concluding (p. 250), says: "I think, upon a careful consideration of the whole subject, that it is safe to follow this precedent, though that the case is entirely free from doubt cannot be said." We think *State v. Oleson* is clearly distinguishable from the case at bar.

In *Lowe v. Commonwealth*, 60 Ky. 237, it is held: "Wherever the constitution has created an office and fixed its terms, and has also declared upon what grounds and in what mode an incumbent of such office may be removed before the expiration of his term, it is beyond the power of the legislature to remove such officer or *suspend* him from office for any other reason or in any other mode than the constitution itself has furnished." In *Commonwealth v. Williams*, 79 Ky. 42, it is said: "Mr. Cooley says 'that, when the constitution defines the circumstances under which a right may be exercised or a penalty imposed, the specification is an implied prohibition against legislative interference to add to the condition, or to extend the penalty to other cases.' Constitutional Limitations, p. 78, 4th ed." The opinion then cites *Lowe v. Commonwealth*, and quotes the holding of that case as above set

out, and then proceeds: "This doctrine was approved in *Brown v. Grover*, 6 Bush (Ky.) 1, and has been followed in many unreported cases since that time."

Counsel for defendant cite *People v. Board of Supervisors*, 40 Mich. 585. In that case the syllabus holds: "Probate judges are not county but state officers, and are not subject to the control of any authority inferior to the legislature." In the opinion (p. 588) it is said: "It is very clear to us that the duties performed by probate judges are in no sense services performed for their respective counties, and that they are in no sense county officers. They exercise a portion of the judicial and prerogative power of the state, and cannot be subjected to the direction of any body inferior to the legislature.

* * * The legislature is the only body having charge of the state interests. It cannot be liable to the local passions and prejudices which may and often do produce confusion in local affairs, and which, if allowed free action, may destroy the independence and break up the business of one of the most important branches of our judicial system." In the brief of counsel for plaintiffs, the only comment made upon the Michigan case is that "this decision is overruled by implication in the later case of *Secord v. Foutch*, 44 Mich. 89." We have examined that case, but are unable to discover how it in any manner overrules or departs from the case of *People v. Board of Supervisors*, *supra*.

After a careful examination of our constitution and of every case cited by counsel on both sides, we are constrained to hold that the only method of removing a county judge from office is by impeachment. It follows that the district court was without jurisdiction in the present action.

A number of other important and very interesting questions are discussed in briefs of counsel, but, inasmuch as the conclusion we have reached on the question of jurisdiction finally disposes of the case, they will not be considered.

The judgment of the district court is reversed, the action dismissed, and defendant reinstated in his office.

REVERSED AND DISMISSED.

REESE, C. J., concurring.

I agree to the judgment dismissing this case, but prefer to base my opinion upon what I conceive to be the conceded facts of the case.

As I understand the case, there is nothing in the evidence tending in any degree to show any moral turpitude in any act of defendant. True, during his previous terms he charged and collected more fees in certain cases than the law allowed, under the belief that it was his duty to make such collections. Under the provisions of our statute he became liable to each and every person so overcharged, the amount of damages being fixed by law, and that without reference to his knowledge or intention at the time of making the charge. But, the effort to remove one from office is an entirely different matter. As I understand the record, the charges were made under the belief that they were legal, and that all were accounted for to the proper officers of the county and nothing retained or appropriated to his own use; in short, that he had erroneously construed or read the law, but without any intention of profiting thereby. If public officers are to be turned out of office and disgraced for every error in judgment, no matter how conscientiously committed, there would seem to be no protection to any person from the highest to the lowest officers of the state, whether executive or judicial. To remove a man from office should require evidence of an intention to do wrong. At any rate, where such intention is so fully negatived as to convince the mind that no wrong was intended, the effort to remove should fail.

SEDGWICK, J., concurring.

The constitution of 1875 provides: "All civil officers of this state shall be liable to impeachment" (article V,

sec. 5), and "All offices created by this constitution shall become vacant by the death of the incumbent, by removal from the state, resignation, conviction of a felony, impeachment, or becoming of unsound mind" (article III, sec. 20). If, therefore, judges of the district court and judges of the county courts hold offices created by the constitution, they are subject to impeachment by virtue of the latter provision. Judges of the district courts were also made subject to impeachment by section 29, art. II, constitution of 1866, but there is no other provision in our present constitution for the impeachment of judges of the district court, except section 20, art. III, which provides that all offices created by this constitution shall become vacant by impeachment, unless they be regarded as "officers of the state." It seems to me there can be no doubt that the district courts and county courts are created by the constitution. Both of these offices are well defined by the constitution, and the judges of both are given large jurisdiction which cannot be taken from them by legislation. The provisions of the constitution in regard to district and county courts are self-enforcing, so that such courts would exist and have ample jurisdiction without any legislation whatever. Section 14, art. III, provides the same method of trial for all impeached officers, except judges of the supreme court. "Any officer other than a justice of the supreme court" is to be tried before that court. If, then, district and county judges are subject to impeachment by virtue of the provisions of the constitution, the legislature can provide nothing in regard to their removal from office that it could not provide as to any other officer whose impeachment is provided for in the constitution. Can the legislature provide for the removal from office of the governor, judges of the supreme court, and the other state officers? If not, how then can it be thought that the judges of the district court and county courts can be removed by or under legislative enactment?

The various provisions of the constitution bearing upon this question are not as definite as might be wished. The

question is a difficult one. It is desirable that all doubt as to the meaning of the constitution shall be removed as far as possible, and for these reasons I concur with the majority.

LETTON, J., dissenting.

I am unable to concur in the majority opinion, and deem the matter of such importance as to require my reasons to be stated. The majority opinion holds that a statute providing for the removal of county officers for misdemeanors in office was repealed by the adoption of the constitution of 1875, at least so far as the office of county judge is concerned.

The solution of the question presented depends upon the construction to be given certain sections of the constitution of 1875. Bearing in mind the rule that repeals by implication are not to be favored, and the rule of constitutional interpretation that the courts in endeavoring to ascertain the meaning of language used in the instrument may look to existing conditions at the time the constitution was adopted—practically a corollary of the ancient rule that courts will look to the old rule, the mischief, and the remedy—it seems to me that the intention of the constitutional convention is not difficult to ascertain. The constitution of 1866 (article II, sec. 29) provided for the removal by impeachment of the judges of the supreme and district courts and the four officers of the executive department of the state only, but gave the legislature power to provide for the removal of county officers and justices of the peace for misdemeanors in office by proceedings “analogous to impeachment,” as Judge IRVINE says in *Hopkins v. Scott*, 38 Neb. 661, 669. The statute in question was enacted in the exercise of this power. The new constitution changed the impeaching body from the house to the legislature as a whole, provided a new court for the trial of impeachments, and added to the list of impeachable officers by making “all civil officers of this state * * * liable to impeachment.” Article V, sec. 5.

The majority opinion is based upon the proposition that the framers of the constitution of 1875 "classed county courts with the supreme and district courts as a part of the judicial system of the state," and the conclusion is drawn that, while a county judge is a county officer in the sense that he is elected by the voters of a single county, he is not a county officer within the meaning of the constitution, and that therefore the statute was repealed by implication when that instrument was adopted. This view seems to be largely based upon the provisions of sections 14, 20, art. III, and section 5, art. V, of the 1875 constitution. Section 14, which is set forth in the majority opinion, confers the power of instituting impeachment proceedings upon the legislature in joint session, and provides: "A notice of an impeachment of any officer, other than a justice of the supreme court, shall be forthwith served upon the chief justice," etc. Section 20, art. III, is set out in the opinion of the majority. It provides how vacancies may occur in offices created by the constitution. Section 5, art. V, provides: "All civil officers of this state shall be liable to impeachment for any misdemeanor in office." These sections are the only provisions of the 1875 constitution which treat of the subject of impeachment.

In the opinion great stress is placed upon the fact that the powers and jurisdiction of county courts are enumerated in article VI of the constitution relating to the judiciary department. I can see no reason for distinguishing in this respect between the county court and other inferior courts or judicial officers named in the article. Section 1 provides: "The judicial power of this state shall be vested in a supreme court, district courts, county courts, *justices of the peace, and police magistrates*, and in *such other courts* inferior to the district courts as may be created by law for cities and incorporated towns." Section 21 of the same article provides that, "in case the office of any judge of the supreme court, or of any district court, shall become vacant * * * the vacancy shall be filled by appointment by the governor," etc.; and that "va-

cancies in all other elective offices provided for in *this article* shall be filled by appointment * * * in such manner as the legislature may provide." A clear distinction is here drawn between the courts of counties and smaller subdivisions, and the higher courts of the state. The more important office of judge of the supreme court or of the district court must be filled by the governor until an election can be had, but the legislature may determine how a vacancy in the office of county judge, a justice of the peace, or a police magistrate may be filled. If the dividing line lies between the county judge and the other magistrates, as the majority think, why this distinction? Again, the district judge may hold court in any county in the state upon the request of the judge of that district. The salary of a district judge is paid by the state and is fixed in the constitution. Section 20, art. III, providing how offices created by the constitution shall become vacant, is not entitled in this connection to the importance given it in the majority opinion, because impeachment is only one of the six causes for a vacancy. Some of the offices may become vacant by resignation, others by conviction of a felony, and others by impeachment. It is also to be noticed that the same section provides that "the legislature shall provide by general law for the filling of such vacancy, when no provision is made for that purpose in this constitution." It will be seen by reference to other provisions of the constitution that if a vacancy occur in the office of governor, the duty shall devolve upon the lieutenant governor, and that in case of a vacancy in the office of auditor of public accounts, treasurer, secretary of state, attorney general, commissioner of public lands and buildings, and superintendent of public instruction, it shall be filled by appointment by the governor. There runs throughout the constitution a distinct division. The executive and judicial offices and offices of importance and dignity, when vacant, are to be filled by the governor, and such officers can only be removed by impeachment. The cause for declaring other offices vacant may be designated by the

legislature, and the legislature may also provide for the manner of filling vacancies.

As to county judge, the constitution says: "There shall be elected *in and for each organized county* one judge, who shall be judge of the county court of *such county*." Const. art. VI, sec. 15. The amount of his compensation is fixed by the legislature. He received it in a manner directed by that body, and from fees collected in the county. By no allowable stretch of the imagination can he be said to be a "civil officer of this state." The meaning of the phrase "officers of the state," or "state officers," has many times been construed. While in one sense almost every county and city officer indirectly is an officer of the government of the state, used in such a connection the courts interpret the words "civil officers of this state" to mean officer of the *state*, as distinguished from those of any county, municipality, or other governmental subdivision. *State v. Dillon*, 90 Mo. 229; *Opinion of Justices*, 167 Mass. 599; *Turner v. Cotton*, 93 Tex. 559; *Ex parte Wiley*, 54 Ala. 226; *In re Speakership*, 15 Colo. 520, 11 L. R. A. 241. I can see nothing in the reasoning of the opinion as to the office of county judge which is not equally applicable to the offices of justice of the peace or police magistrate. I can nowhere find authority conferred upon this court to draw a line between justices of the peace, police magistrates, and county judges, when the constitution itself draws no such line. The argument that, if the legislature has power to provide for the removal of county judges otherwise than by impeachment, it also has the power to remove judges of the supreme and district courts and state officers in like manner seems to be unsound. Where in the constitution special reference has been made to particular officers, and a special tribunal created for the impeachment of such officers, the special provisions control.

The case of *Lowe v. Commonwealth*, 60 Ky. 237, relied upon in the opinion is entirely consistent with these views. The legislature has no power to enact a statute such as this and make it apply to the office of supreme and district judge or state officers, because as to such officers, to quote

from that opinion, the makers of the constitution "declared upon what grounds and in what mode an incumbent of such office may be removed before the expiration of his term," but there is no restriction to be found as to other officers.

With respect to the quotation from the case of *People v. Board of Supervisors*, 40 Mich. 585: This case was decided in 1879. The opinion was written by Judge Campbell, the controversy being over whether the county supervisors had the power to change the compensation fixed by the legislature for probate judges, and it was held that the power to fix salaries lay in the legislature. The very next year the same judge, in *Secord v. Foutch*, 44 Mich. 89, which was an action to try the title to the office of probate judge, said: "The facts were all agreed upon, but the circuit judge, on the hearing, decided he had no jurisdiction, and dismissed the case. He did so on the ground that this court had held that the judge of probate was not a county officer, but was a part of the judiciary system of the state. Such judges are not 'state officers' in the sense in which that term is used in the statutes." The former case, therefore, is no authority upon the point presented.

To sum up: The constitution of 1866 provided for the impeachment of certain officers therein named. The constitution of 1875 added to the number of executive officers, and provided: "All civil officers of this state shall be liable to impeachment," etc. The statute was in force providing for the removal of county officers, as was done in this case, and nothing in the new constitution, either directly or impliedly, repealed it. It seems to argue very little practical common sense in the constitution makers to say they took the view that the cumbersome and unwieldy machinery of impeachment was necessary in order to remove a county judge for misdemeanors in office. I am satisfied that the wisdom, the experience and the sound judgment of that distinguished body of men was such that they never contemplated the possibility of such a construction of the constitution as is adopted by the majority opinion.

WILLIAM A. BIGLEY, APPELLEE, v. NATIONAL FIDELITY & CASUALTY COMPANY, APPELLANT.

FILED DECEMBER 24, 1913. No. 17,268.

1. **Libel: WRITING LIBELOUS PER SE.** In an action for libel, language in the alleged libelous publication which, under the circumstances and in the connection in which it is used, would, by persons of ordinary intelligence and prudence, be understood to charge the commission of a crime is libelous *per se*, although if stated entirely by itself it might not be technically so construed.
2. ———: **JUSTIFICATION.** The language contained in a letter may be libelous *per se*, and the writing and publication of the letter not constitute a libel. If it charges a crime and is therefore libelous *per se*, still, if it is true of the plaintiff, and is written and published with good motives and for justifiable ends, it is not a libel of the plaintiff.
3. **Appeal: INSTRUCTIONS.** If the instructions as a whole correctly state the law, the judgment will not be reversed because of illogical arrangement of the several instructions, if it appears from the whole record that the jury were not misled thereby.
4. **Libel: EVIDENCE.** In an action for libel, it is not competent to prove wide and general circulation of the libel for the purpose of establishing the falsity of the charge or that the defendant was responsible for the libel.
5. ———: **PUBLICATION.** One who publishes a libel is responsible for such distribution and general circulation thereof as is the natural result of his act, such as under the circumstances he might reasonably suppose would follow as a result of the publication. He is not liable for an independent subsequent publication of a similar libel not induced by his own act.
6. ———: ———: **QUESTION FOR JURY.** If it clearly appears that the publications complained of were such independent publications, the evidence thereof should be excluded by the court. If it appears that the facts from which it might be determined whether the defendant was responsible for the publications are in doubt, and the evidence upon that point is substantially conflicting, the question whether the defendant is responsible for such publications should be submitted to the jury under proper instructions.
7. ———: **DAMAGES: AMOUNT.** The evidence as to plaintiff's damages is found sufficient to justify the amount of the judgment.

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Affirmed.*

E. J. Hainer and De Bord, Fradenberg & Van Orsdel,
for appellant.

George W. Berge, contra.

SEDGWICK, J.

This plaintiff was in the employ of the Burlington railroad working in the shops at Havelock as a boiler-maker. He was also in his spare hours a solicitor of insurance, acting as such for the defendant company, and to some extent for other companies. He also collected money from policy-holders in the defendant company. In December, 1909, George W. Wolfe, who was manager of the accident department of the defendant company, wrote letters to various policy-holders at Havelock, which purported to be letters from the defendant company, and to which Mr. Wolfe signed the name of the company by himself as manager. Those letters were, in substance, as follows: Omaha, Nebr., Dec. 18, 1909. Mr. Nelson B. Eshom, Havelock, Nebraska. Dear Sir: You are hereby notified to pay all premiums, when due, to Mr. Cuthbert Ayre, at the boiler-shops in Havelock, or to Mr. Frank L. Marstellar, Manager of the Lincoln Agency, Room 18, Burlington Block, Lincoln. You are also advised that Mr. Bigley is no longer an agent of this company. He has collected premiums from policy-holders in Havelock and retained the money for himself. Thanking you for your patronage and assuring you that both Mr. Ayre and Mr. Marstellar will endeavor to give you the best of service, we are, very truly yours, National Fidelity & Casualty Co. Geo. W. Wolfe, Manager Accident Department.

The plaintiff brought this action in the district court for Lancaster county, alleging damages for libel in writing and publishing these letters. The jury returned a verdict in favor of the plaintiff for \$4,000 damages. The

court required a remittitur of \$1,000, and entered judgment upon the verdict for \$3,000. From this judgment the defendant has appealed.

The defendant denied that Mr. Wolfe "was expressly or impliedly authorized to write said letters or to state in said letters, in substance, that the plaintiff had collected premiums from policy-holders in Havelock and retained the money for himself." The defendant also contended that the letters were not libelous *per se*, and that they were privileged, and also contended that the charge contained in the letters against the plaintiff was true. The statement in the letters, "He has collected premiums from policy-holders in Havelock and retained the money for himself," if stated entirely by itself, would not technically charge the defendant with embezzlement, since it does not state that the money was wrongfully retained or that it was retained without the consent of the company. However, under the circumstances and in the connection in which it was made, the language used would not ordinarily be understood with any other meaning than that the plaintiff had unlawfully appropriated the defendant's money to his own use. The language used, then, was libelous *per se*, and the trial court correctly so considered it.

In the first instruction given by the court to the jury the court stated: "In this case the plaintiff seeks to recover from the defendant for certain libelous language used in a letter sent by the defendant to people in Havelock." The court then in the same instruction stated the definition of libel, which, if we understand the defendant, is conceded to be substantially correct; but the defendant says in the brief: "The jury in effect are told that the defendant has been guilty of using libelous language of the plaintiff; in other words, that the defendant has libeled the plaintiff, and then the definition giving in full what constitutes libel is certainly prejudicial to the defendant in this case, as it defines libels of many kinds in no way applicable to this case, and the statement that the defendant has used libelous language of and concerning

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the plaintiff is certainly prejudicial." The instruction does not merit this criticism. The language contained in a letter may be libelous *per se*, and yet the writing and publication of the letter may not constitute a libel. If the language charges a crime and is therefore libelous *per se*, still if it is true of the plaintiff, and is written and published with good motives and for justifiable ends, the writing which contains it is not a libel. We have seen that the court was right in characterizing the language used as libelous *per se*. It would perhaps have conveyed a clearer idea to the jury if, instead of giving technical definition of libel, the court had in that connection told the jury in plain words under what circumstances language libelous *per se* would or would not constitute a libel against the plaintiff for which he could recover; but if the definition of libel given by the court was not in itself erroneous, and the jury in another instruction were informed under what circumstances the defendant would be liable for publishing the libelous language, we cannot say that the jury were misled by this instruction.

As to the truth of the language complained of, the evidence is somewhat conflicting. The burden of establishing the truth was upon the defendant, and the defendant not only fails to establish the truth of this allegation by a preponderance of the evidence, but it appears that the evidence clearly preponderates against the defendant upon this proposition. Mr. Wolfe's duties were in the principal office of the defendant, which was in Omaha. Mr. Marstellar was the local agent for the company at Lincoln, and was the plaintiff's superior in the business. The premiums were generally collected from the policyholders at Havelock, and usually Mr. Marstellar went there for that purpose. Mr. Morrison was a policy-holder, and it appears that three premiums upon his policy, amounting to \$6, were not received at the company's office in Omaha. Mr. Marstellar testified that these premiums were paid to the plaintiff, and that he had several times called the plaintiff's attention to the matter

and the plaintiff had not paid the money over to him. The plaintiff testified, and he was entirely corroborated by Mr. Morrison, that when the Morrison premiums were paid the plaintiff and Marsteller were together at a pool-hall in Havelock; that they were making these collections jointly. One of them received the money from the policy-holder and the other noted the receipt on a sheet of paper which they had for that purpose, and when the collections were completed the money and papers were turned over to Mr. Marsteller. It would seem from the whole evidence upon this point that between these two men some mistake was made in keeping their account and that this resulted in the failure to properly remit the money.

The defendant having admitted the writing and publication of these letters, even if the jury should find that the libelous language contained in the letters was true of the plaintiff, the defendant would be liable, unless it could establish by a preponderance of the evidence that the letters were published with good motives and for justifiable ends. It is insisted that this question was not properly submitted to the jury. In this connection it is said in the brief that the court instructed the jury, using Latin expressions which could not be understood by the jury. In the fourth instruction the court stated fully to the jury the question whether Mr. Wolfe, in writing and publishing the letters, was acting within the scope of his employment, and then said: "If you find from the evidence that said Wolfe was acting within the scope of his employment, then you are instructed that the letters taken as a whole are libelous *per se*. This being true, the law presumes that the libel is false; that the defendant in writing and in sending out the letters acted maliciously, and that the plaintiff has been damaged by the circulation of said letters." It was not so important that the jury should understand the meaning of the Latin words *per se*, as it was that they should know what issues remained for them to determine. They were still to determine whether the defendant was responsible for the letters, and,

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if so, whether the charge made against the plaintiff was true or false, and, if true, whether it was made by defendant "with good motives and for justifiable ends." The plaintiff had the burden of proof that the defendant was responsible for the letters, and the defendant had the burden as to the truth of the matter charged and that it was published with good motives and for justifiable ends. When the court told the jury that the law presumed that the libel was false; that the defendant, in writing and in sending out letters, acted maliciously, and that the plaintiff had been damaged by the circulation of said letters, it would have been better if in that connection the court had also told the jury that this was only a presumption of fact and merely meant that the burden of proof as to these matters was upon the defendant, so that, if they found from the whole evidence that the matters charged against the plaintiff were true and were with good motives and for justifiable ends, they must find for the defendant. But this was, in substance, told the jury in another instruction, and we cannot find that the jury must have been misled by the instruction complained of.

Complaint is made of the amount of damages allowed by the jury. In this connection it is claimed that incompetent evidence was admitted affecting the measure of damages. The petition named six policy-holders of the defendant company, each of whom had received a duplicate of this letter. The evidence tended to show that others had received the same letters also. There were from 500 to 600 employees in the shops where the plaintiff worked. The plaintiff testified that, immediately after these letters were received by the various policy-holders, some of them showed the letters to the plaintiff, and that the matter became a general subject of discussion and remark among the employees of the shops and other persons with whom the plaintiff had been doing business. Other witnesses were called by the plaintiff, and over the objection of the defendant were allowed to give similar testimony. The defendant now insists that this testimony

was highly prejudicial, and was incompetent and ought not to have been received. Of course, such evidence would not be competent for the purpose of proof that the defendant had made the charge against the plaintiff as alleged. It could be competent only for the purpose of throwing light upon the extent of the plaintiff's damages. For this purpose it would not be competent to show that some other person had independently published the same or a similar statement concerning the plaintiff. In *Schmuck v. Hill*, 2 Neb. (Unof.) 79, it was held that "one who publishes a libel is liable for any subsequent publications which are the natural result of his acts," and this was repeated in *Fitzgerald v. Young*, 89 Neb. 693. The question is whether these conversations and discussions among the shopmen and others, which were in reality subsequent publications of the same statements, were the natural results of the defendant's act in sending these letters to the policy-holders. If they were not, but were clearly independent libels, the evidence should be excluded by the court. If the question whether they were the natural results of the act of the defendant was not clear, so that reasonable minds might differ as to whether they were or were not, then the evidence should be received and should be submitted to the jury upon proper instructions by the court. We think that under the circumstances in this case it was not erroneous to submit this question to the jury.

It is insisted that in any event the judgment is excessive and is not warranted by the evidence. The plaintiff, in his regular employment as a boiler-maker, has for many years received the compensation of 39 cents an hour and has generally earned a little more than \$80 a month. He had been acting as solicitor of insurance for this defendant and other companies for about six months when these letters were published. There is no evidence as to the amount of his profits in this employment except that of the plaintiff himself. He testified that from his business as insurance solicitor he realized from \$150 to

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\$200 a month, and that after the publication of these letters this business was substantially destroyed. He was living with his family, his wife and one child, and he testifies to the injury that he sustained in his business and social relation and in other ways. There is no absolute test of damages suffered under such circumstances and it is very difficult to determine the extent of the injury inflicted. The amount of this verdict, even after the remittitur was required by the trial court, seems large, but it is not impossible that the plaintiff has been damaged to the amount of this judgment. It is peculiarly a matter for the jury to determine, and while, of course, there is a limit beyond which the jury could not be allowed to go, the court cannot interfere with their verdict in such cases, unless it clearly appears that the verdict was induced by passion or prejudice or some consideration other than the evidence in the case. With some hesitation we have concluded that we are not justified in interfering with the verdict on those grounds, and the judgment of the district court is therefore

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

NELLIE A. HERZOG, APPELLEE, v. UNION DEBENTURE COMPANY ET AL.; DIERKS LUMBER & COAL COMPANY, APPELLANT.

FILED DECEMBER 24, 1918. No. 17,369.

1. **Mortgages: TRANSFER.** The transfer of one of 70 negotiable bonds all secured by the same real estate mortgage transfers the mortgage *pro tanto*.
2. ———: **FORECLOSURE.** The foreclosure of such mortgage by one who owns a part of such bonds will not bar a subsequent foreclosure by an innocent purchaser and holder of another of the bonds; such purchaser not having been a party to the first foreclosure.
3. ———: ———: **SALE: TITLE ACQUIRED.** A purchaser at a foreclosure sale takes only the title of the parties to the suit.

APPEAL from the district court for Custer county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

John S. Kirkpatrick and C. H. Holcomb, for appellant.

Sullivan & Squires, contra.

SEDGWICK, J.

The Custer Realty Company, being the owner of real estate in Custer county, conveyed the same by mortgage to the Union Debenture Company to secure the payment of 70 negotiable, interest-bearing coupon bonds of \$500 each. The bonds were payable to bearer, and the Union Debenture Company sold and delivered one of the bonds to this plaintiff. Afterwards, the defendant, the Dierks Lumber & Coal Company, began an action in the district court for Custer county to foreclose several mechanics' liens upon the mortgaged property. The Union Debenture Company was made a defendant in that action, and answered, alleging the execution and delivery of the coupon bonds and the mortgage securing the same, and that it was the owner of 10 of those bonds, and asking for an accounting of the amount due thereon and a foreclosure of the mortgage. The referee appointed by the court reported that the debenture company was the owner of 10 of the bonds, and that the amount thereof and interest thereon was due and unpaid, and the mortgage was foreclosed and the property sold to the defendant, the Dierks Lumber & Coal Company, to pay the debenture company the amount so found due. Afterwards this plaintiff began this action in the district court for Custer county to foreclose the mortgage as security upon the bond held by her. The district court entered a decree of foreclosure in her favor, and the defendant has appealed.

Two grounds are urged for reversal: First, that the plaintiff did not prove that there had been no action at law to collect the amount of the bonds; and second, that

the foreclosure on the cross-petition of the Union Debenture Company is a bar to this action.

1. The petition alleges that there has been no action at law to collect the amount due the plaintiff. The defendant's original answer contained a general denial, which denied the existence of the bonds and mortgage, as well as that there had been no action at law. The defendant afterwards, with the permission of the court, filed an amended answer, which we have not found in this record, and we are not able to say whether it contained a denial or admission of the plaintiff's allegation. Moreover, a witness for the plaintiff stated directly that there had been no action at law, and there is no evidence in the record that there had been. There is therefore no merit in this contention.

2. The bond is payable to bearer, and contains specific provisions that it shall be paid to the holder or holders thereof. The mortgage contains the same provisions and fully describes the bond. The transfer of such a bond transfers the mortgage *pro tanto*. *Studebaker Bros. Mfg. Co. v. McCargur*, 20 Neb. 500; *Todd v. Cremer*, 36 Neb. 430; *Connecticut Trust & Safe Deposit Co. v. Fletcher*, 61 Neb. 166. After the debenture company had transferred this bond, it could not longer exercise any control over it, nor represent in any capacity the owner thereof. The purchaser at a foreclosure sale takes the title of the parties in the action in foreclosure.

The judgment of the district court is right, and is

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

**FRANK THURESSON, APPELLEE, v. CHARLES E. SEIFERT,
APPELLANT.**

FILED DECEMBER 24, 1913. No. 17,431.

1. **Adverse Possession.** Possession or occupancy of land by permission of the owner can never ripen into an adverse title.
2. **Vendor and Purchaser: BONA FIDE PURCHASER.** The purchaser of real estate, with knowledge of his grantor's rights therein, takes only those rights.

APPEAL from the district court for Lancaster county:
WILLARD E. STEWART, JUDGE. *Affirmed.*

William B. Price and Ray J. Abbott, for appellant.

Stewart, Williams & Brown, contra.

SEDGWICK, J.

The plaintiff obtained a decree in the district court for Lancaster county enjoining the defendant from maintaining a stairway over a lot of the plaintiff in the city of Lincoln. The defendant has appealed.

In 1881 George Seifert was the owner of the adjoining lots Nos. 18 and 19. There was then a brick building on lot 18, and on the south side of this building there was a stairway extending over lot 19. George Seifert then sold lot 19 to one Dorr, and in the following year Dorr sold and conveyed the lot to one Thackara. When Dorr and Thackara took the conveyance of lot 19 from George Seifert, they verbally consented and agreed with Seifert that he might maintain a stairway over lot 19 until such time as they should desire to improve and build upon the lot, and Seifert agreed to remove the stairway when it was desired to build upon the lot. The deed from Dorr to Thackara contained the following clause: "Subject to an agreement in regard to the maintaining by one Seifert of the stairway on his building, between said buildings and

the premises conveyed." Afterwards George Seifert conveyed lot 18 to the defendant Charles E. Seifert, who now claims the right to maintain the said stairway by prescription.

It is a general rule of law that possession or occupancy of land by permission of the owner can never ripen into an adverse title, and it seems clear that that rule is applicable in this case. When George Seifert conveyed lot 19 his deed purported to convey the whole of that lot, and, notwithstanding he conveyed the whole lot, he desired to continue the use of a part thereof for his stairway. His grantees gave their qualified consent to his so using it, and under that consent he continued to use it. His use therefore was plainly permissive. He therefore had no easement in lot 19 when he conveyed lot 18 to the defendant. The most that he could convey was his permissive right to use that part of lot 19 encumbered by his stairway, and his conveyance from George Seifert would not change the character and effect of that permission. The defendant did not allege nor attempt to prove that he was a purchaser without notice of the plaintiff's rights in the property, or that he took any other or different title or right than that of his grantor.

The judgment of the district court is clearly right and is

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

H. J. RACKES, APPELLEE, V. FRITZ TRUMPETER, APPELLANT.

FILED DECEMBER 24, 1913. No. 17,445.

Appeal: SUFFICIENCY OF PLEADINGS. When a case, within the jurisdiction of a justice of the peace, is tried in the district court without any objection to the sufficiency of the pleadings either during the trial or after judgment, the issues actually tried will be considered in this court as though properly pleaded.

APPEAL from the district court for Holt county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

James J. Harrington and Hodgkin & Power, for appellant.

Arthur F. Mullen, contra.

SEDGWICK, J.

This was an action upon a contract by which the plaintiff sold some nursery stock to the defendant, and was within the jurisdiction of a justice of the peace, and begun in the county court of Holt county. It was afterwards appealed to the district court for that county, and, from a verdict and judgment in favor of the plaintiff, the defendant has appealed.

The contention of the defendant is that the evidence shows that the defendant countermanded the order for the nursery stock before it was delivered, and that the plaintiff has sued upon the original contract for the purchase price thereof. Under such circumstances it is contended that the plaintiff's cause of action was not upon the original contract, but was for damages in countermanding and refusing to perform the contract. The defendant in his answer set up at great length allegations of fraud and misrepresentation in procuring the contract, and alleged that for that reason he had countermanded the contract. This allegation was denied in the reply. The court submitted to the jury in its instructions the question whether the contract was procured by fraud or was a valid contract in its inception, and also the question whether the contract or order had been countermanded by the defendant, and stated correctly what the measure of damages would be in case the jury found that the contract was valid and had not been countermanded, and what the measure of damages would be in case they found it was valid and had been countermanded by the defendant. It is objected that this instruction was erroneous

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because the petition counts upon the contract itself, and did not contain any allegation of damage by reason of the contract having been countermanded. We think that the defendant cannot now avail himself of this objection to this instruction because all of these questions were fully tried by the parties without objection, and, these issues having been fully tried by these parties in the district court, they cannot now allege, for the purpose of reversing the judgment of the district court, that the issues so tried were not properly presented in the pleadings. The evidence shows that the defendant did formally notify the plaintiff that the order for the nursery stock was countermanded, and that he did not want the same; but, upon the whole record, the evidence is substantially conflicting as to whether the defendant insisted upon this countermand or afterwards waived it, and his pleadings and the whole course of the trial strongly indicate that he waived the defense of countermand, and rested wholly upon fraud and misrepresentation in procuring the contract. The jury rendered a verdict for the contract price of the property. They must therefore have found that the defendant had waived and had not insisted upon his countermand, and this finding is not so clearly wrong as to require a reversal.

The judgment of the district court is

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

MICHAEL J. O'CONNELL, APPELLANT, v. SIOUX COUNTY,
APPELLEE.

FILED DECEMBER 24, 1913. No. 17,493.

1. **Counties: DISALLOWANCE OF CLAIM: REVIEW.** When the county board disallows a claim duly filed, and the record shows affirmatively that the board considered and acted upon the merits of the claim, and did not consider that the claimant had compromised his claim by receiving a part thereof, and the district court, upon

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appeal, confines the issue to that presented to and decided by the county board, such holding of the district court will not be reversed upon appeal to this court.

2. ———: POPULATION: EVIDENCE: COMPENSATION OF COUNTY ATTORNEY. Under section 19, ch. 7, Comp. St. 1907, providing that the salary of county attorneys "in counties having from four thousand (4,000) to eight thousand (8,000) population" shall be \$700, but not providing how the population shall be determined, the latest general census of the federal government does not necessarily control for years subsequent to the taking of such census. The fact is to be determined by the best competent evidence that can be procured under the circumstances.
3. ———: ———: ———. While there is no fixed ratio between the population of a county and the number of votes polled therein, in the absence of a census or other direct evidence, it may be competent to prove the number of votes polled as tending to show the population, since there must be at least as many voters as there are votes polled, and the population is always greater than the number of legal voters.
4. ———: ———: ———. When the number of inhabitants is known for a given year by the government census for that year, and the number of school children in the county is also known from the school census taken in the same year, this tends to show the ratio of population to the school children for other years, but is not conclusive, and, if inconsistent with other evidence, will not establish the number of inhabitants in the years in question.

APPEAL from the district court for Sioux county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Albert W. Crites, for appellant.

Fern S. Baker, *Allen G. Fisher* and *William P. Rooney*, *contra.*

SEDGWICK, J.

This plaintiff was the county attorney for Sioux county for the years 1907, 1908, 1909, and 1910. For the first three years of those named and for the first three-fourths of the year 1910 he was paid the salary at the rate of \$500 a year, and afterwards he filed a claim with the county board for \$750 balance due him for salary for the time

named, claiming that he was entitled to \$700 a year instead of \$500. The county board rejected his claim, and upon appeal to the district court for Sioux county he was allowed \$150 only. From this judgment of the district court he has appealed.

1. During the time specified he filed claims for his salary quarterly at the rate of \$500 a year, which were allowed, warrants duly drawn, and by him presented and paid. The first contention of the county is that, by filing these claims and accepting these warrants, he is now estopped to make any further claim for salary. The trial court, upon demurrer, held that this was no defense, and we think that this ruling in the trial court, under the condition of this record, was correct. Under the statute, as it then was, the salary of the county attorney depended upon the number of inhabitants of the county. In counties of 4,000 or more and less than 8,000 inhabitants the salary was fixed at \$700 a year, and the record of the action of the county board upon the plaintiff's claim recites: "The claim of M. J. O'Connell for \$750 for back pay as county attorney for years 1907, 1908, 1909, and first 3 quarters of 1910, claiming that the number of inhabitants exceeded 4,000 or more, was taken up, and owing to the fact that the board has no way of ascertaining that the population of Sioux county was 4,000 or more for the above years mentioned, on motion the claim was rejected." The record shows that no other issue was presented to or determined by the county board than the issue so determined. The answer filed in the district court presented only this issue. This record shows that it was conceded by the county in the action of its county board that the justice of the plaintiff's claim depended solely upon the number of inhabitants in the county during the years of his services. An amended answer was filed alleging the estoppel relied upon, but, upon demurrer, this issue was by the court stricken from the answer. Under these circumstances the case ought now to be determined upon the issue so tried and determined.

2. The question is whether during the years named Sioux county contained 4,000 or more inhabitants. Section 19, ch. 7, Comp. St. 1907, fixes the salaries of county attorneys in these words: "In counties having from four thousand (4,000) to eight thousand (8,000) population, seven hundred dollars (\$700.)" It did not specify how the number of inhabitants should be determined. By the federal census of 1900 Sioux county contained 2,055 inhabitants, and by the federal census of 1910 it contained 5,599. In some cases, and for some purposes, the statute requires that the population of a given political subdivision can be determined only by a duly authorized census. In other cases it contemplates that the number of inhabitants may be determined by other methods. It has been several times held by this court, and uniformly so far as the writer recalls, that when, as in this case, the statute makes no provision as to the method or time of ascertaining the number of inhabitants, the latest general census of the federal government does not necessarily control. The salary of the county attorney for any year depends upon the number of inhabitants of the county during that year, and that fact is to be determined, as are other facts in litigation, by the best competent evidence that can be adduced under the circumstances. *State v. Long*, 17 Neb. 502; *Kokes v. State*, 55 Neb. 691; *State v. Davis*, 66 Neb. 333. In the opinions in these cases there is some peculiar discussion as to the ratio between the number of votes cast at a general election and the number of inhabitants of the voting precinct. In *State v. Long*, *supra*, Judge MAXWELL, in the opinion of the court, said: "The votes polled at the election in 1883, when multiplied by the well-known ratio of population to the number of voters in a county, is evidence tending to prove the number of inhabitants." And in *Kokes v. State*, *supra*, HARRISON, C. J., in the opinion of the court, commented quite at large on this expression, and, apparently without disapproving of evidence of the number of votes polled as determining the number of inhabitants, concludes that the evidence in that

case was not sufficient to prove that Valley county at the time under consideration had a population of 8,000. The expression of Judge MAXWELL above quoted we think, if rightly considered, is not subject to criticism. There may not be a fixed ratio between the number of votes polled and the number of the inhabitants in the precinct, because there is no fixed ratio between the number of voters in the precinct and the number of votes polled. There is, however, a ratio between the number of voters in the precinct and the number of inhabitants therein, and if the exact ratio is not known it is uniformly found that there are at least a certain number of inhabitants for every given number of voters residing in the precinct. There is also a comparatively uniform proportion between the number of children of school age in a given precinct and the actual residents of the precinct. To say that the number of inhabitants can be accurately determined by knowing the number of children who actually attend school, or knowing the number of voters who do actually exercise the elective franchise, would, of course, be a *non sequitur*. There must, of course, be as many school children in the county as attend school therein, and as many voters as the votes actually polled. If the number of votes polled in the county is multiplied by the ratio of population to the number of voters residing in the county there must be as many inhabitants in the county as the number so obtained, since the number of voters in the county must always be at least as great as the number of votes polled. It is not necessary in this case to inquire whether there is a well-known and uniform ratio between the population of a county and the voters and school children therein. We have the number of inhabitants by the census of 1900, but the record does not show the census of school children in that year, and we have no basis from which to find the ratio of the number of school children to the number of inhabitants for the years in question. The number of school children in the county in 1910 was 1,696. This number multiplied by 3.25 was very near the population

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of the county as shown by the government census. The number of school children in 1907 was 863, multiplied by 3.25 is 2,804.75. The number of school children for 1908 was 931; for 1909 it was 1,348; for 1910 it was 1,696. In 1908 the total vote cast was 1,034, but in 1909 the vote cast was only 616, and in 1910 it was 880. If, therefore, we say that this evidence was competent and tends to show that the ratio of school children to the population during the respective years was 3.25, it shows affirmatively that the population in two of the years was less than 4,000, and the whole evidence does not establish with sufficient certainty the plaintiff's claim for any year, except the year 1910, which was allowed by the district court.

The judgment of the district court is

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

LOUIS RAAPKE ET AL., APPELLANTS, v. JAMES E. BEACOM ET AL., APPELLEES.

FILED DECEMBER 24, 1913. No. 17,518.

Fraudulent Conveyances: BONA FIDE PURCHASERS. If the vendor of property intends by the sale to hinder or delay his creditors, the purchaser will not be protected as a purchaser in good faith as to the purchase price not paid or placed beyond his control prior to his notice of the intended fraud.

APPEAL from the district court for Dakota county:
GUY T. GRAVES, JUDGE. *Reversed with instructions.*

McGilton, Gaines & Smith, for appellants.

Alfred Pizey and Sullivan & Griffin, contra.

SEDGWICK, J.

The plaintiffs recovered judgments against the defendant James E. Beacom, and, executions having been returned thereon unsatisfied, they began this action in the district court for Dakota county to subject a tract of land in that county to the lien of their judgments. John P. Beacom, brother of James E. Beacom, was made a defendant in the action, and it was alleged that the defendant James E. Beacom had transferred the title of the land to the defendant John P. Beacom in fraud of his creditors. The defendants answered, admitting the judgments and the transfer, and alleged that the sale of the land to the defendant John P. Beacom was in good faith and without intent to defraud creditors. The trial court found the issues in favor of the defendants, and the plaintiffs have appealed.

It appears that James and another brother, Owen, were engaged in the grocery business in Omaha, and John resided in Dakota county and was not interested in that business. James bought goods of these plaintiffs in the spring and summer of 1910, for which he was indebted to the plaintiffs, and upon which said judgments were obtained. In May of that year he executed a deed to John conveying the land in question, but the deed was not recorded, and was afterwards surrendered for cancelation and a new deed executed in lieu thereof. The consideration recited in the first deed was \$7,000, and in the second the specified consideration was \$6,400. John testified upon the trial that the true consideration was \$5,500. John had been in possession of the land for some years, and continued in possession during the time involved in these transactions. He also testified that, upon the making of the first deed in May, he paid \$500 in cash thereon; that there was a mortgage of \$1,900 then upon the property, and that the remaining \$3,100 was to be paid by the giving of his notes to his brother James and his brother Owen, who was formerly in partnership with James, as above stated. In

pursuance of this agreement, he did, shortly before he was testifying, and a long time after this action was begun, execute and deliver to his brother Owen a note for \$1,500, payable in 1910, and to his brother James his note for \$1,600, payable May 2, 1920.

Various questions are discussed in the briefs, such as the good faith or want thereof on the part of the defendant John in buying the land; the effect of withholding his deed from record; and whether, if both parties acted in good faith in making the sale and purchase, the defendant John would be protected in making final payment after he had notice that the result would be to defraud the creditors of his grantor. We do not find it necessary to discuss these questions, since we think that this evidence shows that James intended to hinder and delay his creditors when he made the first deed. He was then purchasing goods of these plaintiffs from time to time, for some of which he was indebted when he made the deed to his brother, and intended to, and did, continue such purchases. In the meantime, as a means of obtaining credit, he represented to the plaintiffs and others that he still owned this land and that its value was such as to make his credit good. On these representations he incurred further liabilities to these plaintiffs, which he finds now that he is unable to pay, and, if this transaction is carried out as intended, will not be able to pay for many years. He was not a witness in the case, and there is no direct evidence that he acted in good faith. There are other circumstances in the record indicating bad faith on his part, and, under this evidence, it must be found that he intended to hinder and delay his creditors.

In *Hedrick v. Strauss, Uhlman & Guthman*, 42 Neb. 485, it is held: "In order to constitute one an innocent purchaser of property sold for the purpose of defrauding the creditors of the vendor, the whole consideration must be actually paid before the purchaser had notice of the fraudulent intent. If, after part of the consideration has been paid, the purchaser receives notice of the fraud, he will

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only be entitled to protection to the extent of the consideration paid, or parted with, before notice. As to the purchase price not paid, such vendee will not be regarded as an innocent purchaser of the property."

This is declared to be the law by this court in other cases. The defendants concede that this rule of law would be applicable in this case, unless both parties to the transaction acted in good faith, and upon this feature of the case rest their defense upon the proposition that James acted in good faith in the sale of this land. As we are compelled from the evidence to find otherwise, the judgment of the district court is reversed and the cause is remanded, with instructions to enter a decree that the said deed is void as to the said \$3,100 remaining unpaid, and that the land be sold to satisfy the plaintiff's judgments after satisfying prior liens or charges upon the land.

REVERSED.

LETTON, FAWCETT, and HAMER, JJ., not sitting.

IN RE ESTATE OF BRIDGET SWEENEY.

PETER O'MALLEY, EXECUTOR, ET AL., APPELLANTS, V. STATE OF NEBRASKA ET AL., APPELLEES.

FILED DECEMBER 24, 1913. No. 17,348.

1. WILLS: PROBATE: PARTIES. A proceeding in the probate court to settle the estate of a decedent is a proceeding *in rem*, and every one interested in such settlement is a party in the probate court whether he is named or not, and this is particularly true as to the distribution of an estate under a will.
2. Descent and Distribution: PARTIES. An order of the county court in the settlement of an estate, by which distribution is made of the assets, is appealable to the district court, the proceeding being *in rem*, and all persons interested in the distribution of such assets will be considered parties; and, if A asks for an order of distribution that will exclude B from participation in the

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assets, he cannot afterwards object to the appearance of B for the purpose of protecting his interest in the county court, or afterwards upon appeal to the district court. *In re Estate of Creighton*, 91 Neb. 654.

3. ———: ———. Where the court is called upon to determine the probate of a will, it is acting upon the *res* of the estate, and when an appeal is taken from the county court by the executors to the district court it removes the whole case to the district court, and all parties interested in the distribution are necessarily parties in the district court and are entitled to be heard there. Following *In re Estate of Creighton*, 91 Neb. 654.
4. WILLS: PROBATE: APPEAL: BURDEN OF PROOF. When the proponents in this case took the case to the district court for the purpose of having that court probate the will and determine that it was valid, they took it there with the burden upon them to prove its due execution and the capacity of the testatrix to make it at the time of such execution.
5. ———: ———: TESTAMENTARY CAPACITY: REVIEW. The evidence examined, and *held* that the executors failed to establish the testamentary capacity of Bridget Sweeney at the date of the alleged will, and that their failure to prove the will and establish it, as required by the statute, leaves them without any standing in this court.

APPEAL from the district court for Douglas county:
WILLIAM A. REDICK, JUDGE. *Affirmed*.

George E. Bertrand and Guy R. C. Read, for appellants.

Mahoney & Kennedy, contra.

HAMER, J.

This case had a beginning in the county court of Douglas county. It was to probate the will of Bridget Sweeney. She died May 5, 1909, in Douglas county. The will was dated January 28, 1909. It was offered for probate upon the petition of Peter O'Malley who was named therein as executor. It was filed in the county court of Douglas county May 28, 1909. That court fixed the hearing for June 7, 1909. It ordered notice by publication, and this was given. On June 7, 1909, James P. English, who was

the county attorney for Douglas county, filed objections to the probate of said will. He alleged that he did it under instructions from the attorney general and on behalf of the state of Nebraska. His claim was that the state of Nebraska was interested in said estate by reason of the fact that the deceased died without heirs, and, if intestate, "her entire estate will escheat to the state of Nebraska, and contestant objects to the probate of the alleged will now on file in this court for the reason that at the time the said deceased is stated to have executed said will she was of unsound mind and incapable of making any testamentary disposition of her property." There was a motion on behalf of Peter O'Malley to dismiss the objection of the state, for the reason that the state was not a proper party, had no interest, and that neither the attorney general nor the county attorney had authority to appear in that court or in that action; that said objections did not state facts entitling the state to the relief prayed for by it, and that the contestant was not entitled to appear or be heard. The county court overruled said motion, and found that said instrument was not the last will and testament of Bridget Sweeney and that it should not be admitted to probate. August 5, 1909, Peter O'Malley and Ellen O'Malley, hereinafter called the proponents, filed their appeal bond in said case, and the same was approved, and subsequently they perfected their appeal from the said judgment of the county court to the district court.

On February 19, 1910, John Burchill and Michael Burchill filed in the district court their petition of intervention in said proceeding, in which they alleged that they were the heirs at law of the deceased, Bridget Sweeney, being the sons of John Burchill, deceased, who was a half-brother of Bridget Sweeney. In their petition they recited the proceedings theretofore had, and alleged that by reason of their relationship to the deceased they had an interest in the matter in litigation and in the successful upholding of the order of the county court denying probate; that at the date of the will the testatrix was a woman

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of advanced years, in feeble health of body and mind, being of unsound mind and incapable of making any testamentary disposition of her property; that the signature of Bridget Sweeney to said will was procured by the improper acts and undue influence exerted over her by Ellen O'Malley, the chief beneficiary therein, and her family. The proponents, Peter O'Malley and Ellen O'Malley, severally moved to dismiss the petition of intervention because it did not state facts sufficient to entitle the petitioners to intervene; that they were not entitled to intervention; that the petition was filed too late; that the action was begun in the county court and tried there, and setting up the date of the judgment rendered and the date of their appeal. The motions to dismiss were overruled.

On the 23d day of May, 1910, the Burchills filed an amended petition of intervention, substantially the same as their original petition, with the additional allegation that the interveners had no knowledge of the death of Bridget Sweeney, nor of the proposed probate of said will, nor of the objections thereto by the state of Nebraska for several months after said proceedings took place; but affiant (Michael Burchill) "did not learn said facts until this cause was pending in this court." The proponents then severally moved to dismiss the amended petition of intervention, repeating substantially their motion against the original petition, overruled June 14, 1910. Proponents further moved the court to strike certain portions of said amended petition therefrom, from paragraph 7 the words, "a woman of advanced years, in feeble health of body and mind," and from the same paragraph the words, "and that the pretended will offered for probate is not the will of Bridget Sweeney," and all of paragraph 8 introducing the new issue that the signature to said will was procured by the undue influence of Ellen O'Malley and her family, for the reason that said allegations changed the issues presented to and tried by the county court; the sole question there being raised by the objection that "she was of unsound mind and incapable of making any testamen-

tary disposition of her property." Said motions were overruled and exceptions taken. The proponents then answered, admitting the allegations recited in the record, adopted the original petition for probate as part of their answer, and specifically denying the remaining portions of said petition. The state of Nebraska did not appear in the case after the trial in the county court, and made no appearance whatever in the district court. There was in the district court a trial, a verdict, and a motion for a new trial, and a judgment denying the probate, from which judgment Peter O'Malley and Ellen O'Malley appealed to this court.

On behalf of the appellants it is argued that the intervention of the Burchills, who were designated in the appellants' brief as the defendants, was too late. There is quoted from section 50a of the code, the following: "Pending or to be brought in any of the courts of the state of Nebraska, * * * either before or after issue has been joined in the action, and before the trial commences." It is alleged that the Burchills might have intervened in the county court either before or after issue joined between the proponents and the state, or before the trial commenced in that court; but that thereafter they were precluded from intervening either in that court or in any other court to which the case might be taken. It is further alleged that, conceding for the purpose of this argument the rights of the contestant to intervene, they could not in the district court interject into the record a new or additional objection to the probate of the will. It is also alleged that the court erred in overruling the proponents' motion to strike from contestants' amended petition the new issue of "undue influence" made by paragraph 8, as well as the objectionable words of paragraph 7. It was argued that the issue presented was doubly objectionable; that, in addition to its being a changed issue, it was contrary to the old issue which was retained—that the testatrix was of unsound mind and incapable of making any testamentary disposition of her property. As a part of

the argument it was said that "undue influence in this regard can only be exerted upon one who has testamentary capacity." It was further urged that the court erred in giving its instruction upon undue influence and in submitting this issue to the jury, and in submitting to the jury a separate finding on this subject, because there was no evidence tending to support a finding that there was "undue influence" exerted or attempted. To this there was the retort of the contestants that the jury's finding on the subject was in favor of the proponents, and, consequently, that there was no prejudicial error.

Bridget Sweeney at the time of her death was 80 years old. The instrument presented as the last will and testament of said Bridget Sweeney purported to make some small gifts to charity, and then undertook to dispose of the remainder of her property, which consisted of about \$8,000 in money, by the seventh paragraph. It reads: "As neither my husband John Sweeney, deceased, nor myself have any brothers, sisters, or near relatives, it is my will, and I give, devise and bequeath to my dear friend Ellen O'Malley, who for many years has been near and dear to me, all the rest, remainder and residue of my property both real estate and personal property of any nature whatsoever of which I may die seized or possessed." At the trial of the case there was a general verdict, in which the jury found that the instrument offered for probate was not the last will and testament of Bridget Sweeney, deceased. There were also special findings in respect to interrogatories submitted by the court. (1) "Was Bridget Sweeney on January 28, 1909, of sufficient mental capacity to make a will?" A. "No." (2) "Was the signature of Bridget Sweeney to the document dated January 28, 1909, procured by the undue influence of Ellen O'Malley and her family?" A. "No." After the return of the foregoing verdict and special findings there was a motion for a new trial filed by the proponents, and the same was overruled, and judgment entered finding the instrument was not the last will and testament of Bridget Sweeney.

The appellants contend, first, that the Burchills should not have been permitted to intervene after the case had been appealed to the district court. This question seems to have been considered in *In re Estate of Creighton*, 91 Neb. 654. In that case it is said in the second paragraph of the syllabus: "An order of the county court in the settlement of an estate, by which distribution is made of the assets, is appealable to the district court; the proceeding being *in rem*, all persons interested in the assets are parties. If A asks for an order of distribution that will exclude B from participation in the assets, he cannot afterwards object to the appearance of B to protect his interest in the county court, or afterwards upon appeal to the district court." In that case it was said in the body of the opinion that the proof of the so-called unnamed heirs presents unquestioned authority to stipulate the proposition that the decree of the probate court in the settlement of estates upon matters within the jurisdiction of that court is final unless appealed from, and cannot collaterally be attacked. It was also said that the disposition of that question did not determine the question of the right to appear in the district court after the case had been appealed. The court then makes reference to the case of *Blatchford v. Newberry*, 100 Ill. 484, and says: "What that court decided was that new parties could not appear and present new issues in the appellate court. This, however, does not decide the question that is before us. The proceeding in the probate court to settle the estate of a decedent is a proceeding *in rem*. Every one interested is a party in the probate court, *whether he is named or not*, and this is particularly true as to the question of the distribution of the estate. Under our statute it is not necessary to give any notice of the hearing upon the distribution of the assets of the estate. Everybody interested in that distribution is a party to the proceeding, whether he has appeared in the probate court in the proceeding or not, and so, if the state, in behalf of this charity, was interested in the distribution of the assets

in the probate court, it was necessarily a party before that court, *whether it appeared there or not*. The court was acting upon the *res* of the estate, and not upon the persons interested in it. Therefore, it seems to follow that, when an appeal was taken by the executors to the district court, it removed the whole case to the district court, and all parties interested in the distribution were necessarily parties there and entitled to be heard."

It would seem that the position of this court in that case is amply sustained by the authorities and by the reason of the rule. In contemplation of law the Burchills were parties to the proceeding in the county court; but, whether so or not, the appeal was by the proponents, and not by the contestants. The case was dropped by the state in the county court and the state did not again appear; but between the proponents and the contestants there remains the final contention. The proponents took the case to the district court on appeal. Under the decision quoted, if they took it there, they took it there as against all persons whose rights might be affected by admitting the instrument to probate. They took the same there to have the will probated, to have it determined that it was the last will and testament of Bridget Sweeney. When the proponents took the case to the district court for the purpose of having that court probate the will and determine that it was valid, they took it there with the burden upon them to prove its due execution and the capacity of the testatrix to make it at the time of its execution. They failed to establish the testamentary capacity of Bridget Sweeney at the date of the alleged will. Their failure to prove the will and establish it as required by law leaves them without any standing.

A brief review of the facts should be given as they are shown by the evidence. Richard O'Keefe knew the deceased in Cornwall, England, 52 or 53 years before her decease. She was then a woman past the age of 30 years. Her husband, John Sweeney, was a man of middle age at that time. He was a laborer in the tin mines of Cornwall.

SEDGWICK, J.

The plaintiffs recovered judgments against the defendant James E. Beacom, and, executions having been returned thereon unsatisfied, they began this action in the district court for Dakota county to subject a tract of land in that county to the lien of their judgments. John P. Beacom, brother of James E. Beacom, was made a defendant in the action, and it was alleged that the defendant James E. Beacom had transferred the title of the land to the defendant John P. Beacom in fraud of his creditors. The defendants answered, admitting the judgments and the transfer, and alleged that the sale of the land to the defendant John P. Beacom was in good faith and without intent to defraud creditors. The trial court found the issues in favor of the defendants, and the plaintiffs have appealed.

It appears that James and another brother, Owen, were engaged in the grocery business in Omaha, and John resided in Dakota county and was not interested in that business. James bought goods of these plaintiffs in the spring and summer of 1910, for which he was indebted to the plaintiffs, and upon which said judgments were obtained. In May of that year he executed a deed to John conveying the land in question, but the deed was not recorded, and was afterwards surrendered for cancelation and a new deed executed in lieu thereof. The consideration recited in the first deed was \$7,000, and in the second the specified consideration was \$6,400. John testified upon the trial that the true consideration was \$5,500. John had been in possession of the land for some years, and continued in possession during the time involved in these transactions. He also testified that, upon the making of the first deed in May, he paid \$500 in cash thereon; that there was a mortgage of \$1,900 then upon the property, and that the remaining \$3,100 was to be paid by the giving of his notes to his brother James and his brother Owen, who was formerly in partnership with James, as above stated. In

pursuance of this agreement, he did, shortly before he was testifying, and a long time after this action was begun, execute and deliver to his brother Owen a note for \$1,500, payable in 1910, and to his brother James his note for \$1,600, payable May 2, 1920.

Various questions are discussed in the briefs, such as the good faith or want thereof on the part of the defendant John in buying the land; the effect of withholding his deed from record; and whether, if both parties acted in good faith in making the sale and purchase, the defendant John would be protected in making final payment after he had notice that the result would be to defraud the creditors of his grantor. We do not find it necessary to discuss these questions, since we think that this evidence shows that James intended to hinder and delay his creditors when he made the first deed. He was then purchasing goods of these plaintiffs from time to time, for some of which he was indebted when he made the deed to his brother, and intended to, and did, continue such purchases. In the meantime, as a means of obtaining credit, he represented to the plaintiffs and others that he still owned this land and that its value was such as to make his credit good. On these representations he incurred further liabilities to these plaintiffs, which he finds now that he is unable to pay, and, if this transaction is carried out as intended, will not be able to pay for many years. He was not a witness in the case, and there is no direct evidence that he acted in good faith. There are other circumstances in the record indicating bad faith on his part, and, under this evidence, it must be found that he intended to hinder and delay his creditors.

In *Hedrick v. Strauss, Uhlman & Guthman*, 42 Neb. 485, it is held: "In order to constitute one an innocent purchaser of property sold for the purpose of defrauding the creditors of the vendor, the whole consideration must be actually paid before the purchaser had notice of the fraudulent intent. If, after part of the consideration has been paid, the purchaser receives notice of the fraud, he will

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said that they were a poor old couple and that all they had in the world was this money. Up to that time Deverees had known nothing about any money. On inquiry he was told that the Sweeneys had sold a lot, and that it was believed that they had money in the house. Deverees was then joined by another detective, and they went down into the dugout or cellar. There they found something between the sills on top of the ground and under the floor, and about on a level with the last step. This was a heavy bundle wrapped in paper. They asked Mrs. Sweeney if that was the money, and she said it was. They unwrapped the paper and found a sack tied up inside of it. \$2,000 were found in this sack. During this time a search was going on for Mr. Sweeney. He was found down by the river. They took Mr. Sweeney with them to the house, but he was unable to locate the remainder of the money. The officers continued to dig around in the cellar, but neither of the Sweeneys could help them to find the money. They had buried it, but had lost it and did not know where it was. The officers found \$225 wrapped up in a little cloth and hidden in an old nail keg with a lot of nails and screws. They found \$12 or \$15 in bills in the bed, and they found \$8,000 in a jar buried in the cellar. The only food in the house was a soup bone in an old kettle and some dry bread in a box. The bed was unclean. The plaster was off the walls. The little house was practically uninhabitable. Mrs. Sweeney was unable to talk intelligently upon any subject.

Mr. John J. O'Connor testified that he was a lawyer of many years' practice; that he resided in Omaha; that he had known the Sweeneys; that he had been consulted by them for many years; that he knew that the \$10,000 which they buried was the result of the sale of a lot; that after the Sweeneys were sent to a hospital he represented Mrs. Sweeney in appealing from an order of the probate court placing her under guardianship; that she told him that she remembered Peter O'Malley and Dick O'Keefe, but that she did not know Mrs. O'Malley; that after Mr.

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Sweeney's death Mrs. Sweeney became very melancholy; that she failed rapidly both mentally and physically; that while Mrs. Sweeney was at the O'Malleys Mr. O'Connor visited her there; that her conversation was in fragments; that she could not follow a conversation, and that she would answer "yes" or "no" to a question, and then she would wander off and talk of something else; that she could not carry on a continued conversation and did not for months before she went to the O'Malleys.

There is something of a review of the facts and a review of the law in a case bearing some similarity to this one in *In re Estate of Paisley*, 91 Neb. 139. In that case the contestants had the judgment in the county court, which denied probate of the will, and the proponent appealed to the district court. On the trial in the district court the proponent had the verdict and the judgment, and there was an appeal to this court by the contestants. It was contended by the contestants that the verdict was contrary to, and was not sustained by, the evidence. The contestants were collateral heirs of the deceased, and they contested the will on the grounds of the mental incapacity of the testator and undue influence on the part of the widow in procuring its execution. In the body of the opinion it is said: "Undue influence and weakness of body and mind are often closely allied, and it may be difficult to tell exactly which may have been the stronger factor in bringing about the result in any given case where the testator is enfeebled by illness, and has disregarded the natural objects of his bounty and has devised all, or the greater part of his property, to a stranger or to one whose integrity of purpose may well be questioned because of his conduct and his apparent self-interest as the chief beneficiary of the will, and because of his opportunity to exercise undue influence upon the testator."

In 1 Underhill, Law of Wills, sec. 125, it is said: "The mental and physical capacity of the deceased is to be considered in determining what degree of influence will vitiate his will. * * * The will of one whose independ-

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ence has been weakened by indulgence in dissipation, or whose stamina, physical or mental, has been broken by illness or old age, may be easily overcome. * * * Every case depends wholly upon its own particular facts and attendant circumstances." Section 137: "The fact that the party superintending the execution of the will, or the person who propounds it for probate, takes a large benefit under it, is a circumstance raising a suspicion of undue influence."

Upon an examination of the evidence in this case, we are of the opinion that the general verdict of the jury that the will was not the last will and testament of Bridget Sweeney was correct, as was, also, the special finding that she was not of sufficient mental capacity to make a will. Insufficiency of mental capacity to make a will and undue influence may both be found in an examination of the following cases, which seem clearly to sustain the view to which we have come, that the testatrix was without sufficient mental capacity to dispose of her property at the time the will was executed: *Higginbotham v. Higginbotham*, 106 Ala. 314; *Bevelot v. Lestrade*, 153 Ill. 625; *Rivard v. Rivard*, 109 Mich. 98; *Gordon v. Burris*, 141 Mo. 602; *Perret v. Perret*, 184 Pa. St. 131; *Orchardson v. Co-field*, 171 Ill. 14; *Baker v. Baker*, 102 Wis. 226; *Hampson v. Guy*, 64 Law T. Rep. n. s. (Eng.) 778; *Hall v. Hall*, 18 Law T. Rep. n. s. (Eng.) 152; *Carroll v. Hause*, 48 N. J. Eq. 269; *Purdy v. Hall*, 134 Ill. 298; *Brown v. Fisher*, 63 Law T. Rep. n. s. (Eng.) 465. *Hegney v. Head*, 126 Mo. 619; *Sheehan v. Kearney*, 82 Miss. 688; *Whitelaw's Ex'r v. Sims*, 90 Va. 588; *Miller v. Miller*, 187 Pa. St. 572; *In re Estate of Normand*, 88 Neb. 767; *Seebrook v. Fedawa*, 30 Neb. 424.

By section 126, ch. 23, Comp. St. 1911, it is provided: "Every person of full age and sound mind may, by his last will and testament, in writing, bequeath and dispose of all his personal estate remaining at his decease, and all his rights thereto and interest therein, and all such estate not disposed of by the will shall be administered as intestate

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estate." It will be seen that only persons of sound mind may bequeath and dispose of personal estates.

The judgment is fully sustained by evidence of a most convincing character and by precedent. The judgment of the district court is

AFFIRMED.

FAWCETT and SEDGWICK, JJ., concur in the conclusion.

ANDREW NELSON ET AL., APPELLEES; ALBERT E. PARMELEE, INTERVENER, APPELLANT, V. CITY OF FLORENCE ET AL., APPELLEES.

FILED DECEMBER 24, 1913. No. 17,987.

1. **Judgment: ADJUDICATION AS PRECEDENT.** Where a city of more than 1,000 population and less than 5,000 entered into an agreement with a contractor by which said contractor was to pave a street within the city, and he proceeded with the work until it was completed, and a taxpayer of the city, who had full knowledge of the progress of the work, waited until after its completion and until the city had the use and enjoyment of said street with its improvements, and then sought to enjoin the payment therefor, and the case was determined in the district court against him, and also against him on appeal in the supreme court, in an effort by other plaintiffs in a new case to have the facts re-examined and re-adjudicated, this court will follow the finding and judgment of the supreme court in the former case, not because the judgment in the former case makes the matter under consideration *res judicata*, but because of the rightful force of a just precedent in a legal controversy touching matter of the same kind. *Hadlock v. Tucker*, 93 Neb. 510.
2. **Municipal Corporations: STREET IMPROVEMENTS: INJUNCTION: REVIEW.** Where a taxpayer, in an action such as that last described, because of the alleged inferiority of material used in the pavement of a street, and because of alleged defects in workmanship, seeks to enjoin the payment for the construction of the improvement, he will be required to bring his action before the contractor has invested his money and finished his work, and if he waits until the work is completed and the city is in the full enjoyment of the improvement, and the equities of the case have been fairly considered by the trial court, the findings and judgment of

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such trial court will not be disturbed because of alleged irregularities in the letting of the contract or slight defects in construction; provided, that the work itself is a substantial compliance with the contract.

3. **Appeal: EQUITY: TRIAL DE NOVO.** The supreme court is not bound by the findings and judgment of the trial court in an equity case, but it is the duty of this court to try the case *de novo*, and to reach an independent conclusion as to the weight, credibility and effect of the evidence, and to render judgment accordingly. *Colby v. Foxworthy*, 80 Neb. 244. And the conclusion of the trial court, derived from the consideration of the evidence of witnesses in the presence of the court, will not be regarded, unless upon the whole record, in view of the position of the trial court in weighing such evidence, they appear to be right. *Grandin v. First Nat. Bank*, 70 Neb. 730. And in cases where the evidence in the district court consists of oral testimony which is in sharp and irreconcilable conflict, and the conclusion derivable therefrom is dependent in part upon inferences from circumstances, some of which are in dispute, and in part upon the weight and credibility of testimony to be determined from the degree of competency of the witnesses, their opportunity for knowledge, and the apparent clearness of their recollection, and the reasons therefor, the findings of the trial judge will be considered in determining the issues in this court. *Cooley v. Rafter*, 80 Neb. 181; *Mensen v. Kelley*, 81 Neb. 206.

APPEAL from the district court for Douglas county:
CHARLES LESLIE, JUDGE. *Affirmed.*

Will H. Thompson, for appellant.

Carl E. Herring, John M. Redmond and R. H. Olmsted,
contra.

HAMER, J.

This is an appeal from the judgment of the district court for Douglas county. The pleadings on behalf of the plaintiffs and interveners are of great length. We will content ourselves with a statement of the general purposes of the action, a reference to what is denied or admitted, and a review of the facts as they appear from the evidence. The petition and amended petitions on behalf of the plaintiffs and interveners allege that they are taxpayers and

freeholders of the city of Florence; that they prosecute their action on their own behalf and on behalf of all other taxpayers and freeholders of the city of Florence; that the city is a city of the second class governed by the provisions of chapter 37, Ann. St. 1909. It is then alleged that the city entered into a contract with the defendant M. Ford for the improving of Main street in the city of Florence. While it is claimed that the contract was void for certain alleged errors, it is not denied that the street was improved, yet it is claimed that there are certain defects in parts of the workmanship and inferiority in parts of the material used. The interveners allege the ownership of certain real estate in the city of Florence which they claim to own. From time to time amended petitions of intervention were filed and orders were made pending the final determination of the case. They relate to the granting of a temporary injunction and modifications of the same, and leave to file amended pleadings. The answer of Ford is a denial of the material things set forth in the petitions and petitions of intervention. There is also an answer of the defendant, the city of Florence.

The decree, so far as it is necessary to allege its contents, recites that the case came on to be heard upon the second amended petition of intervention, the answer thereto of M. Ford, and of the city of Florence, the replies, the evidence and the arguments of counsel; that the court finds in favor of the said M. Ford and the said city of Florence and against said interveners; that the order of injunction heretofore granted should be dissolved; that the city of Florence and the said M. Ford had full power and authority to make the agreement for settlement described in said pleadings, and that the same should be and is hereby ratified; that under the terms of said agreement the said M. Ford should have and recover from the said city of Florence the sum of \$47,392.02, together with interest thereon from May 31, 1910, which said amount is in payment for work done and performed on Main street in said city of Florence from a point 107 feet south of the

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south line of Jackson street to the south line of Briggs street, save and except the paving between the tracks and one foot adjoining and outside of each track of the Omaha & Council Bluffs Street Railway Company; that special assessments to pay for the same were twice attempted to be levied by the council of said city and were twice set aside, the first time by this court and the last time by said council because of jurisdictional defects; that said levies heretofore attempted to be made are void and no valid levy can be made; and the said M. Ford is entitled to judgment against said city of Florence for the amount so found due him, and that of said sum \$7,500, as set forth in said pleadings and statement, is available for the purpose of payment on account of the amount herein found due said Ford; that nothing in this decree shall be construed to modify or lessen the liability of said Ford or his bondsmen under the contract between said Ford and said city, or under the bond given for the completion of the work, and for holding said city of Florence harmless from all damages resulting from negligence in the prosecution of said work; that nothing in this decree shall be construed to prevent the city of Florence from retaining out of any moneys herein found due to said Ford a sum not exceeding \$3,500 to protect said city of Florence in the enforcement of the provisions of said contract and bond relative to damages resulting from negligence, or accepting in lieu thereof a good and sufficient bond, and that said city of Florence shall have the right to demand as a condition precedent to the enforcement or satisfaction of the judgment from the bondsmen of said Ford satisfactory assurance of their approval hereof and their continued liability as herein provided; that the said city of Florence shall have the right as a condition precedent to the enforcement of said judgment to demand and receive the delivery to city for cancelation all the warrants issued by said city and delivered to said M. Ford. It is considered, adjudged, and decreed that the orders of injunction heretofore entered are hereby dissolved and set aside; that said M. Ford

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and said city of Florence have and recover of and from the interveners and each of them their costs of suit herein expended from the date of intervention; that said Ford recover from said city of Florence the sum of \$53,796.48, together with interest thereon from May 6, 1912. To this judgment the intervener Parmelee excepted.

We have examined the evidence, which covers more than 800 type-written pages. It shows that there are some defects in the material used and that the workmanship may possibly have been better in part. It is contended by the appellant that the testimony shows that competitors were induced by purchase to refrain from bidding. On the trial a witness was produced who testified that he agreed with Mr. Ford not to bid at Florence "and to give him a clear field up there." He goes into the details, and says that Mr. Madison, the sales agent of the brick company, and himself talked the matter over, that Mr. Ford was with them, and that he said to Ford, that he (the witness) had incurred certain expenses for the promotion of the pavement, and some other expenses. He then comes to the conclusion that Ford "got a special price on the brick" because he (the witness) stayed out and did not bid; that Charles S. Huntington seems to have been in the employ of this witness. He was to receive from the witness five cents a yard for "promoting" the pavement. He seems to have continued working for the pavement until the contract was awarded to Mr. Ford. In appellant's brief it is said: "It is an undisputed fact that Huntington was promoting the pavement, and in the first instance for Fanning. It had been proved and conceded that Fanning did not bid. It is undisputed that he incurred all this obligation, and no one can be brought to say that after going to all this trouble and expense and having the man on the ground to create a favorable sentiment for the brick block, the very kind that Fanning was laying, he neglected to put in a bid except for the reason detailed by him." Huntington testified that Jackson told him that he (Huntington) would be "taken care of." Jackson testi-

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fied, and wholly denied this conversation with Huntington. He testified: "I never said anything of the kind." Ford also denied saying what Fanning testified that he said.

From an examination of this conflicting evidence we do not find anything which seems to justify us in the belief that the district judge, who saw the witnesses and heard them testify, was wrong in his conclusion concerning these facts. We are unable to say that the finding and judgment of the district court are unsupported by the evidence. It was for the district court to determine the facts in the first instance, and we are unable to say upon the conflict of the evidence before it that its judgment is wrong, and it seems to be right. A verdict on conflicting evidence will not be disturbed where the evidence is sufficient to sustain a recovery in favor of either party. *Schmidt v. Village of Papillion*, 92 Neb. 511; *Kinney v. Chicago, B. & Q. R. Co.*, 92 Neb., 383. In *O'Chander v. Dakota County*, 90 Neb. 3, it was held: "In an action at law, the judgment of the district court, rendered upon conflicting evidence, will not be set aside by a reviewing court, unless it can be said that it is unsupported by the evidence and is clearly wrong."

The principle recognized in the foregoing decisions may be applied to the findings and judgment of the district court in an equity case, except that on appeal, in such case, the hearing in this court is necessarily a trial *de novo*, because of the statute of 1903 prescribing the mode of reviewing findings of fact. Section 681a of the code provides: "That in all appeals from the district court to the supreme court in suits in equity, whether now pending or hereafter to be brought to said court, wherein review of some or all of the findings of fact of the district court is asked by the appellant, it shall be the duty of the supreme court to retry the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the bill of exceptions, and upon trial *de novo* of such question or questions of fact reach an independent conclusion as to what finding or findings are required under the plead-

ings and all the evidence, without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof."

In *Grandin v. First Nat. Bank*, 70 Neb. 730, it is said, in substance, that the conclusion of the trial court derived from the consideration of the evidence of witnesses examined in the presence of the court will not be regarded, unless upon the whole record, in view of the position of the trial court; in weighing such evidence, it appears to be right. And in *Stocker v. Nemaha County*, 72 Neb. 255, it is said that this statute requires the supreme court to go over all the evidence and to reach its own conclusion.

In *Whedon v. Lancaster County*, 80 Neb. 682, it is said, in substance, that the effect of the above act is to require the supreme court to hear *de novo* all appeals from decrees in equity cases and to render such judgment as should have been rendered by the court below.

In *Coad v. Coad*, 87 Neb. 290, it is said that this act requires, in an appeal in equity, the retrial of the case by the supreme court, without reference to the conclusion reached in the lower court.

Notwithstanding the foregoing decisions, the weight of authority would seem to be that, in an equity case appealed to this court, it will be considered that when the evidence in the district court consists of oral testimony which is in sharp irreconcilable conflict, and the conclusion derivable therefrom is dependent in part upon inferences from circumstances, some of which are in dispute, and in part upon the weight and credibility of testimony to be determined upon the degree of competency of the witnesses, their opportunity for knowledge, and the apparent clearness of their recollection, and the reasons therefor, the findings of the trial court will be considered in determining the issues in this court. *Mensen v. Kelley*, 81 Neb. 206; *Cooley v. Rafter*, 80 Neb. 181; *Wetherell v. Adams*, 80 Neb. 584.

In *Coad v. Coad*, *supra*, it is said, in the body of the opinion: "This being an equity case, this court is required

to retry the cause upon the evidence submitted and preserved in the bill of exceptions and 'reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof.' Code, sec. 681a." In this connection it is further said: "While in cases where the evidence is conflicting we may (and should) consider the findings of the district court (*Wetherell v. Adams*, 80 Neb. 584), yet the burden is, by appeal, placed upon this court to retry the case."

It is proper to remark that this case is not a stranger to this court. The record in the instant case refers to the former case of *Hadlock v. Tucker*, 93 Neb. 510, 520. The pleadings in that case are included in the bill of exceptions in the instant case. It is contended in that case that there were jurisdictional defects, and that the judge's attention was specifically directed to such defects, and that the lower court decided that it found against the plaintiffs, but refused any relief against them. It is contended that the jurisdictional defects taken in that case were well taken, and that they may still be considered. That case was threshed out in this court and a judgment rendered. Whatever was specifically determined in that case cannot be determined in this one. A brief reference to what was before the court in that case is perhaps proper. We will only attempt to recite part of the facts as they are shown by the record and the report of the case. On or about the 2d day of August, 1909, the city council of the city of Florence passed, and the mayor approved, an ordinance ordering the paving, guttering, and subdraining of Main street. That case included the making of the improvements now under consideration in the instant case. It was urged that the ordinance formed but one paving district, which included all the property within the city, and that the improvement district comprised the whole of the city; that no fund had been provided with which to pay the tax for the improvement, and

that there was no money in any fund of the city which could be appropriated to pay the same; that on the day on which the contract was made there had been contracted debts against the city and against the street and alley fund, and for miscellaneous purposes, a sum in excess of \$3,400, and that there were contracted against the city, including the light fund, the water fund, and the salary fund, amounting to more than \$5,500, and that there were valid outstanding warrants for the current year and previous years amounting to more than \$1,800, for the payment of which no appropriation had been made, and that said warrants were drawing interest at the rate of 7 per cent. per annum, and that for the payment of the warrants no provision had been made and no warrants had been provided; that the whole of said city was within the school district of which it formed a part, and that the school district had voted the limit of taxes that could be raised and was unable to levy any tax on its property within the city to pay for the improvement of Main street, and that all the taxes levied by the school district would be needed for the purpose of maintaining the schools therein; that the mayor and council had no authority to impose a tax for paving the street upon any property not abutting on or adjacent to the street improved, and that they were without authority to order Main street to be paved, or to order the creation of an improvement district for the purpose of paving or causing such improvement; that there were certain defects in the proceedings touching the passage of the ordinance and touching its publication, and that because of these defects there had never been jurisdiction to pass the ordinance, and that it had never become a law; that the cost of paving, curbing, guttering and subdraining the intersections on said street would exceed the sum of \$10,000, and that no fund had been appropriated to pay the same; that no vote of the people had been taken on the question of paving the street and no petitions therefor had been filed; that there were no definite plans prepared upon which the contractor could

bid with certainty, and upon which the city could award a contract; that the said M. Ford, mentioned as the contractor in the instant case, was also mentioned as the contractor in that case, and it was sought to restrain him from proceeding with the improvements attempted to be made. Among other things it was urged that the bid of Ford was not the lowest bid for the improvement; that it exceeded the estimates of the city engineer; that the bids were never advertised as required by the terms of the ordinance; that they were not published in a legal newspaper printed in said city; that the said city had no sewer system, and it was urged that one would soon have to be provided for it, in which case the sewers would have to intersect and cross Main street in many places, and in some parts would have to be constructed along and in the street; that it was not provided in the ordinance how the tax should be levied; that it was not provided that there should be a limit for the beginning or completion of the work. It was also alleged that the work had proceeded.

There were amended pleadings and separate answers filed by the city of Florence and by one Tucker, one Craig, one Price, and one Allen, and by Ford and Jackson in their own behalf. It was alleged in these answers that the city of Florence was a municipal corporation having more than 1,000 and less than 5,000 population, and that it was governed by the provisions of chapter 37, Ann. St. 1909; that the plaintiffs in said case were resident freeholders of the city; that the improvement district thereby created included all the real estate within the city; that pursuant to the ordinance the city advertised for bids for doing the work, and that bids were received, opened and considered, and that the contract was awarded to said Ford for doing the work, and that thereafter he began and completed said work; that the school district comprised all the property in the district; that it was the owner of the land where the schoolhouse stood; that the city of Florence was the owner of the real estate within its limits; that ample provision had been made for con-

nection with any sewer system that might be installed in the city without interference with the pavement on Main street. It was further alleged in that case that during all that time the plaintiffs in that case were present in Florence and knew of the progress of the work, and it was urged that they were estopped to deny or question the validity of the contract.

A joint answer was filed by Ford and Jackson, being the same Ford mentioned in the instant case. It was alleged in the said joint answer that the contractor was proceeding with the work, and that the proceedings from the inception thereof to and including the advertisement for bids and the letting of the contract to said Ford were regular and in accordance with the law and the ordinances. It was also alleged that the plaintiffs in said case had knowledge that the city contemplated the improvement of Main street in the manner provided for, and also had knowledge of the passage of the ordinances of August 2, 1909. The details of all the proceedings in the district court were set up, and the several steps taken toward the completion of the work. It was also alleged that the defendant Ford prosecuted the work to full completion in the month of May, 1910; that the plaintiffs took no action in the prosecution of their suit until January, 1910, when they filed in said case another supplemental petition, the only purpose of which was to prevent the city from issuing its bonds. An estoppel was pleaded in said case in said answer against the plaintiffs by reason of their inaction in asserting objections to the improvements within the proper time. The plaintiffs in said action replied to the answer of defendants by a general denial, and trial was had, and there was a general finding in favor of the plaintiffs and against the defendants upon the allegations touching the issue of bonds, and a perpetual injunction was issued restraining the city of Florence, its officers and agents from issuing the bonds of the city in payment for the improvements referred to, and Jackson and Ford were restrained from receiving any bonds of

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the city and for the construction of the improvements referred to, and the costs were taxed to the defendants; but, upon the other issues involved in the case, the finding and decree were in favor of the defendants, and the suit was then dismissed at the plaintiffs' costs, in so far as all such issues were concerned.

There was then an appeal to this court by the plaintiffs. This court held in that case that the decree of the district court upon the question of the right of the city to issue its bonds for the purpose of providing funds with which to pay the contractor for paving the street was in favor of the plaintiffs, and that no appeal had been taken by the defendants, and therefore that that part of the decree in that case must be taken as a final adjudication of the question, and that no further reference need be made to it; but it was then further said by Chief Justice REESE, delivering the opinion of this court: "There seems to be no doubt that the paving of the street has been fully completed by the contractor, and the work approved and accepted by the city officers. While it is true the proceedings of the council in letting the contract were irregular, and, in some respects, censurable, yet we find nothing in the evidence showing that the contractor should be deprived of his compensation for doing the work, if there is any method by which provision may be legally made for his payment. * * * It is the opinion of my associates that, as the contractor has paved the portion of the street in question in good faith, and with a large outlay of money, depending upon the faith and credit of the city, he should not be deprived of his compensation for the work performed, and, since he was not restrained by injunction, or other process, from constructing the pavement, and his contract required him to push the work, he should not now be required to lose the money expended under his contract at the suit of these plaintiffs, who took no decisive action, before the full completion of the work, that would justify the contractor in delaying to perform his contract with the city."

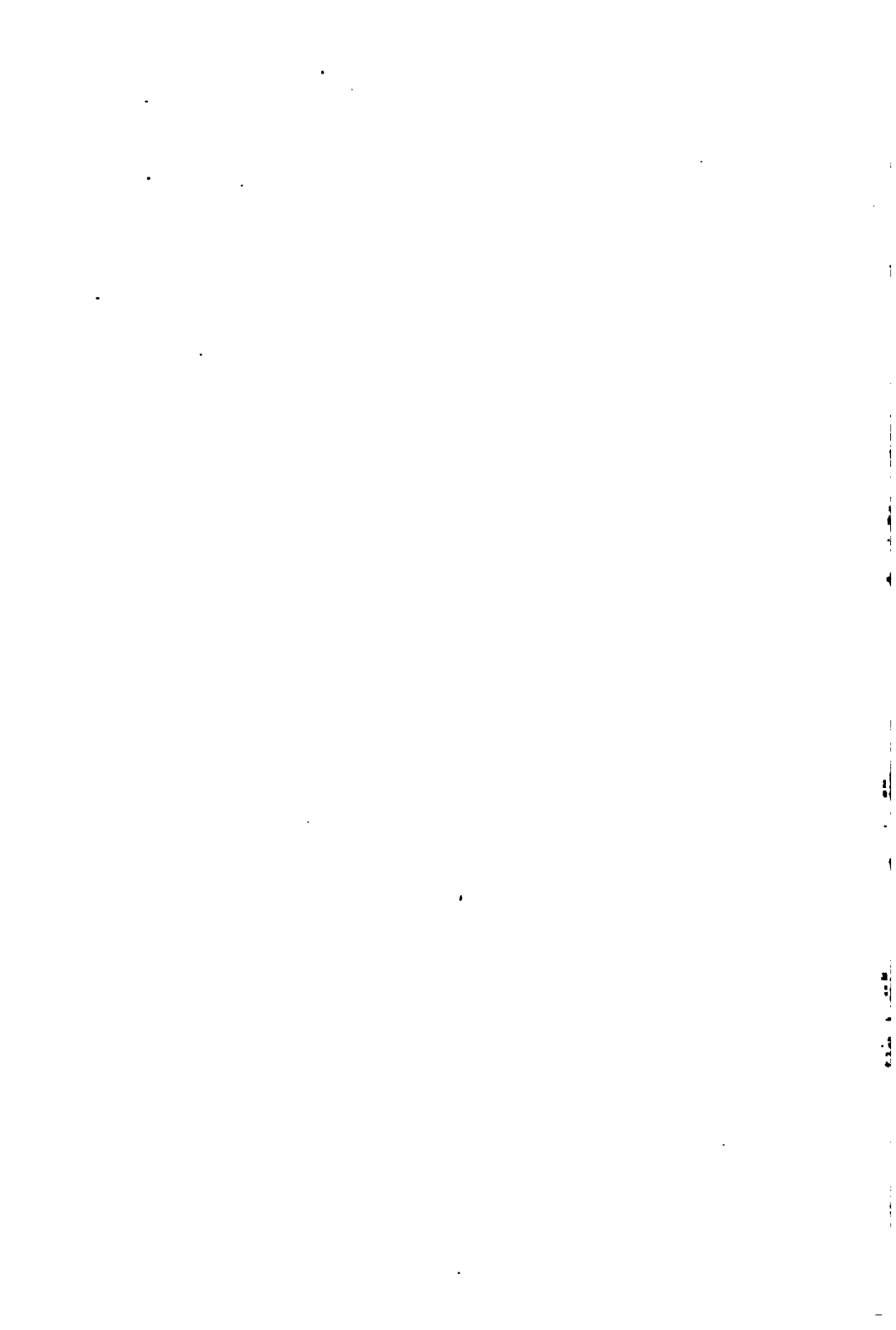
It was also held in that case that, where a bid for the paving of a street exceeded the engineer's estimate to the extent of a few dollars, the extra being limited to one item, and the bid, as made, was accepted by the city council, but upon entering into the contract the excess was discovered and eliminated and the contract brought within the estimate, the contract was not thereby void. It was also held in that case that, where the city entered into an agreement with the contractor by which the contractor was to pave a street within the city, and he proceeded with his work under the contract and under the direction of the city officers until the completion thereof, a taxpayer of the city, having full knowledge of the progress of the work, would not be heard to enjoin the payment thereof, after the completion of the work. Of course, we cannot in this case review the proceedings taken in the former case. We cannot review what was done in *Hadlock v. Tucker*, *supra*.

We are unable to say that the judgment of the district court is wrong, and it is therefore

AFFIRMED.

FAWCETT, J.

I concur, on the ground upon which the district court based its findings and judgment.



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Constitutional Law. See JUDGES, 2. MUNICIPAL CORPORATIONS, 13.

1. Sec. 4778, Ann. St. 1911, authorizes the chief officer of a department of the state government to employ an attorney, other than the attorney general, in cases of importance, and does not conflict with sec. 1, art. II of the constitution. *Follmer v. State* 217
2. The power conferred on a county to raise a road fund by taxation *held* not violative of sec. 7, art. IX of the constitution, prohibiting the legislature from imposing taxes on municipal corporations for corporate purposes. *City of Albion v. Boone County* 494
3. In a prosecution for gambling, the validity of the proviso in ch. 108, laws 1887, which amended sec. 214 of the criminal code by adding a proviso "for the recovery of money or other property lost in gambling," *held* immaterial, since the prosecution did not depend upon the proviso. *Goemann v. State* 582
4. Ch. 59, laws 1905, regulating the treatment and control of dependent, neglected and delinquent children, *held* to conform to sound public policy. *State v. Bryant* 754
5. Sec. 2, ch. 59, laws 1905, defining the power and jurisdiction of the district court as a juvenile court, *held* not unconstitutional as creating a new court. *State v. Bryant*..... 754
6. The proviso in sec. 2, ch. 59, laws 1905, the juvenile court act, giving to the police judge in cities having a population of 40,000 concurrent jurisdiction with the county judge within the city, *held* not an inducement to the passage of the act, and hence it is not necessary to determine its constitutionality. *State v. Bryant* 754
7. The validity of the amendment of 1913 (laws 1913, ch. 38) to ch. 59, laws 1905, which amendment relates to the pensioning of dependent children of indigent parents, *held* not involved in the litigation. *State v. Bryant*..... 754
8. Ch. 250, laws 1913, providing the rate of interest on loans

Constitutional Law—Concluded.

- on certain chattels, *held* violative of sec. 15, art. III of the constitution, prohibiting the passage of local or special laws regulating interest on money. *Althaus v. State*..... 780
9. Statutes enacted in the exercise of police power must not violate rights guaranteed by the constitution, nor arbitrarily interfere with private business. *State v. Sperry & Hutchinson Co.* 785
10. That the legislature by ch. 179, laws 1911, describes a legitimate private business, and provides that any person engaged therein shall be held to be engaged in a gift enterprise, will not oust the jurisdiction of the courts to determine the true character of the business. *State v. Sperry & Hutchinson Co.*, 785
11. Ch. 179, laws 1911, prohibiting the giving of "trading stamps," *held* violative of art. I of the Bill of Rights and fourteenth amendment to the Federal Constitution. *State v. Sperry & Hutchinson Co.* 785

Contracts. See BROKERS. MECHANICS' LIENS, 9, 10.

1. While executory and before a breach, the terms of a written contract may be changed by a subsequent parol agreement; and it requires no new consideration. *Easton v. Snyder-Trimble Co.* 18
2. Evidence, in a suit to annul a contract for fraud, *held* to sustain verdict for plaintiff. *York & Co. v. Boomer*..... 62
3. To authorize reformation of a written contract, it must be established, by clear and satisfactory evidence, what the contract was and that the writing does not express the contract made. *Hallgren v. Becker* 415
4. In an action on a contract to support a stepmother in consideration of her returning to and caring for her husband, evidence of her husband's prior cruel treatment of her *held* competent on the issue of consideration for the contract. *Mack v. Mack* 504
5. Where a party has full opportunity to inform himself as to a proposed exchange of properties and inspects the property, he cannot invoke the aid of equity to cancel the contract. *Bowers v. Raitt* 567

Corporations. See QUO WARRANTO. SALES, 2, 3.

1. The manager of sales of a manufacturing corporation has power to contract for the selling of its wares, and persons contracting with such corporation are not bound to know of a by-law limiting his authority. *Monarch Portland Cement Co. v. Creedon & Sons*..... 185
2. In an action against a corporation on a note, denial of its legal existence is not permissible under sec. 144, ch. 16, Comp. St. 1911. *Gilligan v. Gilligan Co.* 437

Costs. See NEW TRIAL, 1.

Counties and County Officers. See HIGHWAYS, 4-7.

1. Sec. 87, ch. 78, Comp. St. 1909, requires a county to contribute toward the repair of a bridge across the Platte river which extends into such county, though it is located mainly within the adjoining county. *Dawson County v. Phelps County* 112
2. The word "stream," as used in sec. 87, ch. 78, Comp. St. 1909, relating to bridges over streams which divide counties, is used in a general sense, and applies to rivers and smaller courses of running water. *Dawson County v. Phelps County*, 112
3. Counties, in the construction and maintenance of bridges, must provide for such uses as may be fairly anticipated for the proper accommodation of the public where the bridge is situated. *Pettzmeier v. Colfax County*..... 675
4. Evidence, in an action against a county for damages to a threshing outfit caused by the collapse of a bridge, held to sustain verdict for plaintiff. *Pettzmeier v. Colfax County*, 675
5. Under sec. 77a, art. I, ch. 18, Comp. St. 1911, it is the duty of the register of deeds upon approval of his annual account to turn over to the county treasurer all fees in excess of statutory compensation for official services. *State v. Uerling* 694
6. Mandamus will lie to compel the register of deeds to turn over excess fees to the county treasurer. *State v. Uerling*, 694
7. Under sec. 19, ch. 7, Comp. St. 1907, providing that the salary of county attorneys shall be based on population, without providing how the population shall be determined, the last general federal census does not necessarily control, but the population is to be determined by the best evidence available. *O'Connell v. Sioux County* 826
8. To determine the population of a county to fix the salary of a county attorney, evidence of the number of votes polled is competent in the absence of a census or other direct evidence. *O'Connell v. Sioux County* 826
9. To determine the population of a county to fix the salary of a county attorney, evidence of the government census for a given year and of the number of school children for the same year is competent to show the ratio of population to school children for other years, but is not conclusive, and, if inconsistent with other evidence, will not establish the population in the years in question. *O'Connell v. Sioux County* 826

Courts. See CONSTITUTIONAL LAW, 5, 10. JUDGMENT, 4.

1. The ruling of one judge of the district court upon a gen-

Courts—Concluded.

- eral demurrer to a petition is not conclusive upon another judge of the same court who afterwards tries the case. *Follmer v. State* 217
2. Under sec. 2, art. VI, Const. U. S., treaties are the supreme law of the land, and state judges are bound thereby. *Butschkowski v. Brecks* 532
3. In a suit to enjoin payment for street improvements, the supreme court will follow its decision in a prior suit by other parties involving the same questions of fact. *Nelson v. City of Florence* 847

Criminal Law. See CONSTITUTIONAL LAW, 3. GAMING. INDICTMENT AND INFORMATION. INTOXICATING LIQUORS, 10. LARCENY.

1. The sentence for a crime committed before the taking effect of the indeterminate sentence law should conform to the law in force at the time of the commission of the offense. *Stehr v. State* 151
2. Under sec. 448 of the criminal code, requiring arraignment, a conviction of a felony will be reversed where accused entered his objection after verdict, unless the record affirmatively shows that accused was arraigned before trial. *Burroughs v. State* 519
3. In a prosecution for gambling, refusal to permit accused to withdraw his plea of not guilty for the purpose of objecting to a variance between the information and the original complaint held not an abuse of discretion. *Goemann v. State*... 582
4. Where three parties are jointly charged with gambling, and one demands a separate trial, an instruction that defendant is charged with gambling with one of the parties, without naming the other, held not erroneous. *Goemann v. State*.. 582
5. Failure to caution the jury as to the evidence of an accomplice in a misdemeanor case held not error, in the absence of a special request so to do. *Goemann v. State*..... 582
6. An instruction in a misdemeanor case that a reasonable doubt is an actual substantial doubt arising either from the evidence or want of evidence is not erroneous. *Goemann v. State* 582
7. It is not an abuse of discretion, in a misdemeanor case, to appoint a former prosecutor, who began the prosecution, to assist in the trial, though he has prosecuted a civil action against the accused for services of another attorney in the case. *Goemann v. State* 582
8. An appellate proceeding, under sec. 515 of the criminal code, to settle a point of law in a prosecution wherein accused was

Criminal Law—Concluded.

discharged, may be dismissed for failure of the county attorney to refer in his brief to the volume, page or section where acts of congress, on which the ruling below was based, may be found. *State v. Roy*..... 690

Damages. See EMINENT DOMAIN. INTOXICATING LIQUORS, 2. LIBEL, 7.

1. Verdict for \$15,000 for death held not excessive. *Wright v. Chicago, R. I. & P. R. Co.* 317
2. The measure of damages for improper construction of a building is the difference between the value of the building as constructed and its value if constructed according to contract. *Lincoln Stone & Supply Co. v. Ludwig*..... 722

Deeds. See EVIDENCE, 3.

1. In a suit to cancel a deed, evidence held to sustain finding that plaintiff authorized delivery of the deed. *Lamb v. Lamb* 627
2. Evidence held to sustain finding that grantor did not make a mistake in the description of the land conveyed. *Lamb v. Lamb* 627

Descent and Distribution.

The first four subdivisions of sec. 2, ch. 23, Comp. St. 1911, relating to distribution of an intestate's estate, are limited by the fifth and sixth subdivisions, and where a father died, leaving a child by a former wife, and also his widow and their child, J., who afterwards died under age and unmarried, the estate which J. took from her father descended to her sister. *In re Estate of Van Orsdol*..... 98

Divorce.

1. Decree of divorce in which the court found that certain real estate in the wife's name was accumulated by the joint efforts of husband and wife, and adjudged that the wife pay the husband for his interest therein and that the title be quieted in the wife, held sustained by the record. *Gleeson v. Gleeson* 13
2. In a suit for divorce, allowance of \$6,000 as alimony held proper. *Bolton v. Bolton* 343

Drains.

1. A landowner who knew of the placing of tile drains in a highway and assisted in making drains on his own land cannot, several years afterward, enjoin the maintenance of the drains in the highway. *Wachter v. Lange*..... 290
2. Public authorities may construct drains along the side of highways if necessary to render them passable, and if, in so doing, they divert waters of a pond upon the lands of

Drains—Concluded.

one not consenting to the work, they may not ordinarily be enjoined, but they may be liable for damages to persons whose lands or crops are injured. *Wachter v. Lange*..... 290

Ejectment. See **ESTOPPEL**, 2. **EVIDENCE**, 7, 8. **PLEADING**, 2.

1. Evidence that defendant in ejectment purchased an outstanding title while the action was pending cannot be received under a general denial. *Risher v. Madsen*..... 72
2. Evidence in ejectment held insufficient to establish an equitable title in defendant. *Tillson v. Holloway*..... 635
3. When the owner of realty, indebted to his son, puts the son in possession of the land until settlement is made between them, and the father dies without a settlement, his devisees and heirs cannot recover the land without payment of the amount due the son. *Tillson v. Holloway*..... 635

Elections. See **MUNICIPAL CORPORATIONS**, 6, 7, 10, 13-16.

1. Allowance of fees for mileage to an election officer sustained. *Blair v. Sheridan County* 124
2. Police magistrates in cities of the second class being municipal officers, the legislature may provide the time of their election. *State v. Reilly* 232
3. A county is liable for new ballots to be used at a general election, where by mistake of the clerk the ballots first provided were defective. *Wahlquist v. Adams County*..... 682

Electricity. See **MUNICIPAL CORPORATIONS**, 2-12.**Eminent Domain.**

1. The measure of damages in condemnation proceedings to remove a mill-dam is the difference between the value of the mill property before and after the removal. *Maynard v. Nemaha Valley Drainage District* 610
2. In condemnation proceedings to remove a mill-dam, prospective profits from the use of the water-power for the development of electricity are too remote to be elements of damage, where there is no proof of a present purpose to make such development. *Maynard v. Nemaha Valley Drainage District* 610
3. An owner of property who knowingly permits a corporation, having the power of eminent domain, to use or damage his property may be limited to his remedy for damages. *Hall v. Crawford Co.* 460
4. Sec. 46, ch. 78, Comp. St. 1905, accepting the grant of land for highways provided by sec. 2477, Rev. St. U. S., reserves to landowners the right to recover damages for land taken on the opening of such highways. *Rule v. Sioux County*... 736

- Equity.** See **APPEAL AND ERROR**, 51-58. **CONTRACTS**, 5. **INSURANCE**, 7.
1. To prevent a multiplicity of suits against an irrigation district, a court of equity may acquire jurisdiction to cancel void district bonds in the hands of many different holders. *Paxton Irrigation District v. Conway*..... 205
 2. A suit in equity to enjoin a suit at law and to reform the written contract upon which the suit is based depends on plaintiff's right to such reformation. *Hallgren v. Becker*... 415
- Estoppel.** See **BOUNDARIES**. **EXECUTORS AND ADMINISTRATORS**, 2, 3. **LANDLORD AND TENANT**, 1. **LIFE ESTATES**, 2. **MUNICIPAL CORPORATIONS**, 25. **PARENT AND CHILD**, 1. **PLEADING**, 2. **WATERS**, 4.
1. To create an estoppel *in pais*, the party against whom it is invoked must have made the declaration or done the act on which the estoppel is based, either with intent to deceive, or with such negligence as to amount to a constructive fraud. *Onn Lumber & Shingle Co. v. Powell Lumber Co.*... 267
 2. Where plaintiff and wife deeded land to A without consideration, and A reconveyed it to the wife, whose deed was not recorded, and thereafter plaintiff exchanged the land for other land and the purchaser took possession under a deed from A executed at plaintiff's request, plaintiff in ejectment held estopped to claim the land. *Kime v. Krenek*..... 395
- Evidence.** See **ATTORNEY AND CLIENT**, 4. **CONTRACTS**, 4. **COUNTIES AND COUNTY OFFICERS**, 9. **EJECTMENT**, 1, 2. **INTOXICATING LIQUORS**, 6. **LIBEL**, 3, 5, 6. **MASTER AND SERVANT**, 4-7. **MORTGAGES**, 1. **MUNICIPAL CORPORATIONS**, 5, 18, 27, 28. **PLEADING**, 2, 9. **WILLS**, 4, 6, 8, 9, 13, 14. **WITNESSES**.
1. In an action on a note between the original parties thereto, parol evidence is admissible to show want of consideration, and the purpose for which it was given. *Franklin State Bank v. Chaney* 1
 2. Exclusion of evidence of contents of letter held error, where witness testified that she received the letter by mail, that it was signed by defendant, whose signature she knew, and was lost, in the absence of cross-examination as to her means of knowledge of the signature. *Risher v. Madsen*... 72
 3. The true consideration for a deed of real estate may be shown by parol evidence, though the deed recites a consideration. *Goodman v. Smith* 227
 4. A certificate of the filing of an instrument for record under secs. 9603, 9608, Ann. St. 1911, executed by one purporting to be register of deeds or his deputy, is sufficient *prima facie* proof that the document was so filed. *Smith Bros. v. Woodward* 298
 5. Ambiguity in a written instrument may be explained by

Evidence—Concluded.

- parol evidence showing the mutual understanding of the parties. *Myers v. Persson* 467
6. Admission of parol evidence of the contents of a letter held proper. *Mack v. Mack* 504
7. A certain letter written by the then owner of the legal title 26 years before, in pencil upon coarse brown paper, in which it appeared that words had been retraced and figures rewritten, held of little value as evidence to establish an equitable title to land. *Tillson v. Holloway*..... 635
8. Evidence to establish an equitable title to land as against the legal title must be clear and satisfactory. *Tillson v. Holloway* 635

Exceptions, Bill of. See APPEAL AND ERROR, 21.

Execution.

1. The right to levy an execution upon a stock of goods sold in violation of the bulk sales law is cumulative to prior remedies, and it is not necessary that an execution be first issued and be returned unsatisfied as to other property of the judgment debtor. *Mutz v. Sanderson*..... 293
2. Under the bulk sales law, a sale of a stock of goods in bulk without complying with the statute is void as to creditors, and the goods are subject to execution as though no sale had been made. *Mutz v. Sanderson* 293
3. Where a transcript of a county court judgment was filed with the clerk of the district court of the county and a transcript from said clerk's office was filed in the district clerk's office of the county where execution was issued, a sale of land thereunder held not vulnerable to collateral attack because the transcript was not filed directly in the county where execution was issued. *Bresce v. Snyder*..... 384
4. As against a collateral attack, a mere irregularity in the notice of sale of real estate upon execution is cured by confirmation. *Bresce v. Snyder* 384

Executors and Administrators.

1. Where an executor with power of sale under the will takes title to land in satisfaction of a mortgage thereon, he holds it as personalty, and can convey the land without order of court; and the purchaser takes good title unaffected by subsequent proceedings of a county court in another state. *Batley v. Batley* 729
2. Where an executor has settled his accounts with a devisee and the estate, the devisee is estopped to claim any interest in the land received by the executor in satisfaction of a mortgage and sold to a bona fide purchaser. *Batley v. Batley* 729

Executors and Administrators—Concluded.

3. Where an executor, who is also an heir, sells land received in satisfaction of a mortgage to a *bona fide* purchaser, he is estopped to afterwards claim any interest in the land.
Batley v. Batley 729

Forcible Entry and Detainer. See JUSTICE OF THE PEACE.

1. In an action of forcible entry and detainer, a judgment for plaintiff, the owner of the legal title, does not extinguish a title in defendant by adverse possession. *Towles v. Hamilton* 588
2. Forcible entry and detainer being merely a possessory action, the question of title cannot be determined therein. *Towles v. Hamilton* 588
3. The rule of the code (sec. 29) that every action must be prosecuted in the name of the real party in interest applies in forcible entry and detainer cases. *Towles v. Hamilton*.. 588
4. Where leased land is sold in a tax foreclosure suit to which the lessor is a party, and the lessee, to avoid eviction, attorns to the purchaser, he may interpose such action as a defense to an action by his lessor for possession. *Bowman v. Goodrich* 696

Fraudulent Conveyances. See EXECUTION, 1, 2.

1. Evidence *held* not to show that dealings between husband and wife were fraudulent as to creditors of the husband. *Conservative Life Ins. Co. v. Boyce*..... 408
2. Where a wife, at her husband's direction, deposited money as indemnity for his release on bail, the rule that transactions between husband and wife by which creditors are prevented from collecting their debts will be scrutinized closely, and proof of their *bona fides* required, will be applied. *Valparaiso State Bank v. Petermichel*..... 606
3. Evidence that a wife deposited money at her husband's request *held* to show *prima facie* his ownership of the money. *Valparaiso State Bank v. Petermichel* 606
4. Where a debtor sells property to hinder or delay his creditors, the purchaser will not be protected as a purchaser in good faith as to the purchase price not paid or placed beyond his control prior to his notice of the intended fraud. *Raapke v. Beacom* 831

Gaming. See BILLS AND NOTES, 2. CONSTITUTIONAL LAW, 3. CRIMINAL LAW, 3-7.

- Evidence in a prosecution for gambling *held* to sustain a conviction. *Goemann v. State* 582

Garnishment.

1. Only the interest of the attachment debtor in funds in the

Garnishment—Concluded.

- hands of the garnishee can be applied on the plaintiff's claim. *Farrington v. Fleming Commission Co.*..... 108
2. Where the holder of a check on a bank has in good faith paid the maker in full for it, the deposit to the amount of the check is not subject to garnishment at the suit of another creditor of the maker, notwithstanding sec. 188 of the negotiable instruments act. *Farrington v. Fleming Commission Co.* 108
3. Where a garnishee answers that he has money of the judgment debtor, it is proper to allow a third party to intervene and contest the right of plaintiff to apply the money on his claim. *Farrington v. Fleming Commission Co.*..... 108
4. Service on the garnishee impounds the funds in his hands, and he must pay the money to the party having the right thereto as determined by the court. *Farrington v. Fleming Commission Co.* 108

Habeas Corpus. See APPEAL AND ERROR, 25.

1. Where the sole parent of an infant surrendered her custody to another, evidence held to show that the child's best interest required that she remain in such custody. *State v. Nebraska Children's Home Society* 255
2. Habeas corpus by a parent to recover the possession of his minor child may be brought in the county where the unlawful detention takes place. *State v. Nebraska Children's Home Society* 255
3. A father, the sole parent, by agreement in writing, can surrender the legal custody of his infant child to another, and he cannot regain custody, unless he can show breach of the agreement, abuse of the child, or that the child's best interest requires it. *State v. Nebraska Children's Home Society*, 255

Highways. See APPEAL AND ERROR, 36, 49, 63. CONSTITUTIONAL LAW, 2. DRAINS. EMINENT DOMAIN, 4.

1. One who appears at the hearing on a petition for the establishment of a public road cannot thereafter complain that he had no legal notice of the hearing. *Richardson v. Frontier County* 27
2. It is not essential that a public road be laid out upon the exact line prayed for in the petition. *Richardson v. Frontier County* 27
3. Admission of certain evidence in proceedings for the assessment of damages from the opening of a highway held prejudicially erroneous. *Rector v. Red Willow County*..... 167
4. Cities of the second class and villages were road districts within sec. 76 of the road law (Comp. St. 1899, ch. 78) as

Highways—Concluded.

- it existed prior to the amendment of 1901. *City of Albion v. Boone County* 494
- 5. Failure of a city to demand from the county payment of its portion of a road fund for a series of years, though with knowledge that the county is using all the fund, held not to constitute laches. *City of Albion v. Boone County*..... 494
- 6. One-half of the road fund collected by a county within the limits of a city belongs to the city, and the city officers cannot compromise the right to such funds. *City of Albion v. Boone County* 494
- 7. Where a county has collected a road tax levied within the limits of a city, it holds one-half thereof in trust for the city, with the continuing duty to pay it to such city. *City of Albion v. Boone County* 494
- 8. Section-lines are by sec. 46, ch. 78, Comp. St. 1911, declared to be public roads which may be opened by the county board whenever the public good requires it. *Warner v. Cavey* 778
- 9. The propriety or necessity of opening and working a section-line road is discretionary with the county board, and is not subject to review. *Warner v. Cavey* 778
- 10. The only limitation upon the discretion of the county board in opening section-line roads is that of compensation for private property taken or damaged. *Warner v. Cavey*..... 778
- 11. A county board may open a highway in the form of a *cul-de-sac* on a section line. *Warner v. Cavey*..... 778

Homestead.

- 1. In a suit to establish homestead rights, failure to prove the acquisition or occupancy of a homestead defeats plaintiff's case. *Cunningham v. Marshall* 302
- 2. The word "homestead," as used in sec. 4, ch. 36, Comp. St. 1905, the homestead act, means the house and parcel of land where the family reside and have their home. *Anderson v. Schertz* 390
- 3. Under sec. 4, ch. 36, Comp. St. 1905, any attempted conveyance or incumbrance of the homestead is absolutely void unless executed and acknowledged by both husband and wife. *Anderson v. Schertz* 390
- 4. A contract in writing to convey a homestead, which has been signed by both husband and wife, but not acknowledged, is void as to the entire homestead, though its value exceeds \$2,000. *Anderson v. Schertz* 390

Husband and Wife. See FRAUDULENT CONVEYANCES, 1-3.

Indictment and Information. See INTOXICATING LIQUORS, 10.

1. An information cannot be aided by intendment, nor by recital or inference, but must explicitly state all that is essential to constitute the offense. *Gaweka v. State*..... 53
2. A complaint under sec. 30 of the criminal code for resisting a municipal officer while making an arrest without a warrant, which does not allege that the offense was committed within the municipality, is fatally defective. *Gaweka v. State* 53
3. An information charging accused with violating the pure food law by wilfully overreading a test of cream purchased by him for commercial purposes is not demurrable for failure to charge an intent to defraud the seller; the statute not having made intent an element of the offense. *State v. Thorp* 310

Infants. See CONSTITUTIONAL LAW, 4-7.**Injunction.** See DRAINS. EQUITY, 2. MUNICIPAL CORPORATIONS, 5, 29.

Injunction will not lie to obtain possession of real estate, where the ordinary legal remedies are adequate. *Hollinrake v. Neeland* 530

Insurance. See BILLS AND NOTES, 3.

1. In an action on an accident insurance policy providing that, if injury resulted from an intentional act, liability should be one-fifth of the amount otherwise payable, recovery is thus limited, where assured was intentionally struck a slight blow, and fell, striking his head and fatally fracturing his skull. *Ryan v. Continental Casualty Co.*..... 35
2. Where an application for insurance of live stock provides that no liability shall attach until the application has been approved by the home office, held that ordinarily the company is not liable for loss occurring before such approval. *Johnston v. Indiana & Ohio Live Stock Ins. Co.*..... 403
3. An insurance contract is governed by the law in force at the time of the making of the contract. *Johnston v. Indiana & Ohio Live Stock Ins. Co.*..... 403
4. Where, in an action on a life insurance policy, the question of the truth or falsity of the answers of assured in his application are submitted to a jury on conflicting evidence, and under proper instructions, a verdict for plaintiff will not be set aside unless clearly wrong. *Jacoby v. Prudential Ins. Co.* 422
5. Instruction as to the use of liquors by assured held applicable to the evidence. *Jacoby v. Prudential Ins. Co.*..... 422
6. The liability of a member of a mutual insurance company,

Insurance—Concluded.

- organized under ch. 45, laws 1897, *held* to be similar to that of a stockholder in an ordinary stock corporation. *Randall v. McClain* 487
7. A suit by a receiver of an insolvent mutual insurance company, organized under ch. 45, laws 1897, to recover an assessment to pay liabilities, *held* properly brought in equity, and summons may be issued to any other county. *Randall v. McClain* 487
8. In order to recover an advanced premium for insurance, where plaintiff alleges that he refused to submit to such medical examination as was requested by the company, he must allege and prove rescission of the contract. *Witt v. Old Line Bankers Life Ins. Co.* 748

Interest. See CONSTITUTIONAL LAW, 8.

Intoxicating Liquors. See MANDAMUS.

1. Where, in an action for damages from the sale of intoxicating liquors, defendant testified that he owned a small amount of property, *held* not error to permit plaintiff to show on cross-examination that defendant owned other property. *Colman v. Loeper* 270
2. Verdict for \$5,516.70 *held* not excessive. *Colman v. Loeper*, 270
3. An action for loss of support caused by drunkenness may be brought at any time within four years from the date of the last sale of liquors. *Colman v. Loeper*..... 270
4. Where the disability of drunkenness is permanent, the injury is a continuing one, and recovery may be had for the whole period of the disability. *Colman v. Loeper*..... 270
5. That the wife acquiesced in the sale of intoxicating liquors to her husband is no defense to an action by her for loss of support through his disability caused by drink. *Colman v. Loeper* 270
6. In an action by a wife for damages from the sale of liquors to her husband, *held* not error to admit evidence by a station agent that he had delivered bottled goods labeled "mineral water" to defendant that in his opinion were intoxicating liquors. *Colman v. Loeper* 270
7. One who has suffered injury in consequence of his own voluntary intoxication may recover on the bond of the saloon-keeper from whom the liquor was procured. *Henkel v. Boudreau* 338
8. It is not essential that the signer of a petition for a liquor license shall have resided in the village for the time required to make him a legal voter; residence in good faith being sufficient. *Shackelford v. Zimmerman* 547.

Intoxicating Liquors—Concluded.

9. The supreme court will on its own motion dismiss an appeal from an order in mandamus requiring reinstatement of a saloon license, where the record shows that the term of the license has expired, and no motion was made to advance the case. *State v. Armstrong* 592
10. Under sec. 8, ch. 50, Comp. St. 1911, each act of selling or giving away of the liquors named to a minor is a crime, and an indictment which charges in the same count the selling and giving to a minor any such liquors is defective for duplicity, and will be quashed on motion. *State v. Freiburghouse* 603
11. Where the electors of a village of an election held under sec. 25, ch. 50, Comp. St. 1911, have voted in favor of no license, the village board cannot issue a license. *Ford v. Thompson* 658
12. The residence of a person, for the purpose of testing his qualifications as a petitioner for a saloon license, is where he has his established home, and is habitually present, and to which, when he departs, he intends to return. *Shaw v. Alexander* 774

Judges.

1. The office of police magistrate being created and the length of the term fixed by the constitution, the incumbent cannot be removed before the expiration of his term. *State v. Reilly* 232
2. The only method of removing a county judge from office is by impeachment, as provided in sec. 14, art. III of the constitution; sec. 1, art. II, ch. 18, Comp. St. 1911, being invalid in so far as it prescribes any other method. *Conroy v. Hallowell* 794

Judgment. See TAXATION, 9.

1. In a proceeding to revive a dormant judgment, where the debtor pleads payment, a presumption of payment arises, which the judgment creditor must rebut; and the rule obtains where the judgment creditor is demanding the payment as a condition precedent to the debtor's right to quiet his title to real estate as against the judgment. *Alberts v. Courtland Wagon Co.* 313
2. Where the name of one plaintiff and the items for which he alone can recover are dropped from an amended petition, the judgment is not a bar to his right to maintain a separate action. *Henkel v. Boudreau* 338
3. Under sec. 18, ch. 20, Comp. St. 1911, a transcript of a judgment of a county court may be filed in the office of the clerk of the district court of any other county without having

Judgment—Concluded.

- been first filed in the county in which the judgment was rendered. *Bresee v. Snyder* 384
4. Where a special tribunal is empowered by statute to ascertain facts, and there is no provision for a review thereof by the courts, its action is final, in the absence of fraud or mistake. *State v. Houston* 445
 5. The right to revive a dormant judgment and to sue thereon are cumulative remedies, and where either is asserted the court in its discretion, under proper evidence, may give judgment for the other. *Young v. City of Broken Bow*..... 470
 6. A judgment which is valid and not fully paid may be revived. *Young v. City of Broken Bow*..... 470
 7. Under the facts stated, revivor of judgment denied. *Hetzel v. Bennett* 768

Jury.

1. A venireman held not guilty of deception as to his relations with opposing counsel, where he admitted the relations and answered all questions truthfully. *Blakely v. Omaha & C. B. Street R. Co.* 119
2. A juror drawn for three weeks' service in the district court, who serves during said period, can recover for all the days of such term, Sundays excepted, unless finally excused by the court. *Cochran v. Lancaster County* 130

Justice of the Peace.

1. Where title to land is drawn in question in an action of forcible entry and detainer before a justice of the peace, it is his duty to refuse to proceed further. *Bowman v. Goodrich* 696
2. Where a justice of the peace wrongfully enters judgment in an action involving title to land, the district court, on appeal, should dismiss the action. *Bowman v. Goodrich*.... 696

Landlord and Tenant. See FORCIBLE ENTRY AND DETAINER, 4. VENDOR AND PURCHASER, 5-8.

1. A landlord who for several months failed to declare a forfeiture of a long-term lease for nonpayment of rent, while the tenant, with the landlord's knowledge and consent, was making permanent improvements under his lease, held estopped to declare a forfeiture after the improvements have been completed. *Harte v. Shukert* 210
2. An option in a written lease giving the lessee the right to purchase the land upon definite terms is an enforceable contract. *Dengler v. Fowler* 621
3. A lease may be modified after its execution so as to give the lessee an enforceable option, upon expiration of the lease, to

Landlord and Tenant—Concluded.

- purchase the land on definite terms; the rentals stipulated in the original lease and a subsequent promise to pay the purchase price being a valid consideration for the new agreement. *Dengler v. Fowler* 621
4. The possession of a tenant is notice, not only of his rights as lessee, but of all other interests of which inquiry would elicit knowledge. *Dengler v. Fowler*..... 621

Larceny.

- In a prosecution for cattle stealing under sec. 117a of the criminal code, the jury need not declare in their verdict the value of the cattle. *Griffith v. State* 55

Libel.

1. Where the language in a publication would, in the connection in which it is used, be understood by persons of ordinary intelligence to charge the commission of a crime, it is libelous *per se*. *Bigley v. National Fidelity & Casualty Co.*, 813
2. Where the language in a letter, charging a crime, is true, and is published with good motives for justifiable ends, it is not libelous. *Bigley v. National Fidelity & Casualty Co.* 813
3. It is not competent to prove wide circulation of a libel for the purpose of establishing its falsity or defendant's responsibility. *Bigley v. National Fidelity & Casualty Co.*... 813
4. A person is responsible for such circulation and publicity of a libel as is the natural result of his act, or he might reasonably anticipate, but is not liable for a subsequent publication of a similar libel not induced by him. *Bigley v. National Fidelity & Casualty Co.*..... 813
5. In an action for libel, evidence of independent publications of a libel, not induced by defendant, should be excluded. *Bigley v. National Fidelity & Casualty Co.*..... 813
6. Where the evidence is conflicting, the question whether defendant is responsible for the publication of a libel is for the jury. *Bigley v. National Fidelity & Casualty Co.*..... 813
7. In an action for libel, charging embezzlement, \$3,000 damages held not excessive. *Bigley v. National Fidelity & Casualty Co.* 813

Life Estates.

1. The conveyance of the life estate conveys all the rights of the life tenant, and the remainderman cannot enforce a forfeiture of the life estate by reason of such conveyance. *Bohrer v. Davis* 367
2. Where a remainderman consented to a sale of a part of the estate by the life tenant and the purchaser has held it for more than 17 years, the remainderman is estopped from recovering the land. *Bohrer v. Davis* 367

Limitation of Actions. See ADVERSE POSSESSION. INTOXICATING LIQUORS, 3. TRUSTS, 2.

1. A mortgagor's right of action to quiet his title, recover possession, and redeem from the lien of the mortgage, accrues when the mortgagee takes possession with claim of ownership, and the ten-year limitation of the statute will then begin to run. *Jackson v. Rohrborg* 85
2. Limitations do not begin to run against a right of action until the right exists. *Bohrer v. Davis*..... 367
3. Limitations will not run against a remainderman's right of possession until the particular estate is terminated. *Rohrer v. Davis* 367
4. That certain plaintiffs in a suit to redeem from a mortgage foreclosure sale are minors, who claim title through descent, does not toll the statute of limitations where it had commenced to run during the lifetime of their ancestors. *McNeill v. Schumaker* 544
5. In an action for damages for personal injuries, an amended petition held to state a new cause of action, which was barred by limitations. *Westover v. Hoover*..... 596
6. Where a father, indebted to his son, placed him in possession of land until settlement was made, and the father died without a settlement, in ejectment by the administrator of his estate, held that the statute of limitations did not apply either to the right of the devisees and heirs to possession of the land or to the claim of the son to reimbursement for the money loaned to his father. *Tilson v. Holloway*..... 635
7. The statutory right of owners of unoccupied territory within a village for its detachment, under sec. 101, art. I, ch. 74, Comp. St. 1911, is one to which the statute of limitations does not apply. *MacGowan v. Village of Gibbon*..... 772

Malicious Prosecution.

Where, in an action against trustees for malicious prosecution, the evidence failed to show malice or want of probable cause, held that a verdict was properly directed for defendants. *Talcott v. Rice* 539

Mandamus. See COUNTIES AND COUNTY OFFICERS, 6. INTOXICATING LIQUORS, 9.

Where an attempted appeal from the granting of a saloon license is without merit, and is not prosecuted in good faith nor with reasonable diligence, and the city council orders the license to issue, mandamus will not lie to compel the council to reconvene and recall it. *State v. Reuling*..... 507

Master and Servant.

1. It is the right and duty of a railroad company to make

Master and Servant—Concluded.

- reasonable rules for the protection of its employees. *Wright v. Chicago, R. I. & P. R. Co.* 317
2. Whether a rule of a railroad company for the protection of its employees is adequate is for the jury. *Wright v. Chicago, R. I. & P. R. Co.*..... 317
 3. Though an extra train run by plaintiff's decedent was required to proceed under full control and protect itself within switch-yard limits, it did not relieve defendant from liability for the negligence of the crew of a switch engine in failing to exercise ordinary care to avoid a collision with the extra. *Wright v. Chicago, R. I. & P. R. Co.*..... 317
 4. In an action for death, evidence held to sustain judgment for plaintiff. *Wright v. Chicago, R. I. & P. R. Co.*..... 317
 5. The burden is on defendant to establish by a preponderance of evidence the defense of contributory negligence and assumption of risk. *Wright v. Chicago, R. I. & P. R. Co.*..... 317
 6. Where the evidence showed that defendant company had failed to promulgate any rules regulating the speed of switch engines, held that whether such failure constituted negligence was for the jury. *Wright v. Chicago, R. I. & P. R. Co.*, 317
 7. Where plaintiff failed to show actionable negligence, held that a verdict was properly directed for defendant. *Kelley v. Omaha & O. B. Street R. Co.*..... 456

Mechanics' Liens.

1. In a suit to foreclose a mechanic's lien, the owner held entitled to a certain credit. *Boyer-Van Kuran Lumber & Coal Co. v. Colonial Apartment House Co.*..... 180
2. Though a mechanic's lien, when filed, attached only to a lease-hold estate, it may be enforced against the fee after the lease-hold has been merged therein by the acts of the landlord. *Harte v. Shukert* 210
3. The statute creating the right to a mechanic's lien does not authorize a lien for premiums paid by a contractor for liability insurance. *Harte v. Shukert*..... 210
4. Where a tenant under his landlord's authority purchased material in June for improvements on the property, and the landlord authorized the purchase of other material in September, held that the latter authorization did not extend the time for filing a lien for the material furnished in June to four months from the September purchase. *Carr & Neff Lumber Co. v. Krogh* 537
5. Material furnished held to have been furnished under one contract. *Lincoln Savings & Loan Ass'n v. Webber*..... 698
6. Where, in an affidavit for a mechanic's lien, the property

Mechanics' Liens—Concluded.

- is described so as to enable a party familiar with the locality to identify it, it is sufficient. *Lincoln Savings & Loan Ass'n v. Webber* 698
- Way v. Cameron* 708
7. A recital in a notice of a mechanic's lien by a subcontractor that the materials were furnished for the owner under a contract will be treated as surplusage. *Way v. Cameron*, 708
8. The object of the mechanic's lien law being to secure the claims of those who have contributed to the erection of a building, it should be liberally construed. *Way v. Cameron*, 708
9. Where a contractor furnishes the plans and specifications for a dwelling-house, a claim that the work was done according to the plans and specifications is not a defense to a counterclaim for damages for defective construction. *Lincoln Stone & Supply Co. v. Ludwig* 722
10. In a suit to foreclose a mechanic's lien, evidence held to sustain judgment for defendant on a counterclaim for damages for improper construction. *Lincoln Stone & Supply Co. v. Ludwig* 722

Mortgages. See LIMITATION OF ACTIONS, 1, 4. PRINCIPAL AND AGENT, 1, 2.

1. A grantee in possession of realty under a deed given as a mortgage, who seeks to defeat the equity of redemption by showing a parol settlement or an oral election to treat the conveyance as an absolute deed, must establish such parol agreement by a clear preponderance of the evidence. *Sprecher v. Folda* 201
2. A deed given as security for debt conveys the legal title, and the grantor's remaining interest is not subject to the lien of a judgment, and can be reached only by equitable proceedings. *First Nat. Bank v. Spelts* 387
3. Where an agent, authorized to loan money on land, purchased mortgaged land in his own name agreeing to have the mortgage canceled, and thereafter sold the property to defendant, held, in a suit by the principal to foreclose the mortgage, that he was entitled to a decree; the mortgage remaining of record. *Walker v. Hokom* 399
4. Where purchasers at a foreclosure sale took actual possession, claiming title, and held adversely for more than ten years after the mortgagor's heirs had attained their majority, the right to redeem was barred. *McNeill v. Schumaker* 544
5. The transfer of one of 70 negotiable bonds secured by the same mortgage transfers the mortgage *pro tanto*. *Herzog v. Union Debenture Co.* 820

Mortgages—Concluded.

6. The foreclosure of a mortgage by the owner of one of several bonds secured thereby is not a bar to a subsequent foreclosure by an innocent purchaser of another of the bonds who was not a party to the first foreclosure. *Herzog v. Union Debenture Co.* 820
7. The purchaser at a foreclosure sale takes only the title of the parties to the suit. *Herzog v. Union Debenture Co.*..... 820

Municipal Corporations. See CONSTITUTIONAL LAW, 2. HIGHWAYS, 4-7. LIMITATION OF ACTIONS, 7. STATUTES, 2.

1. Petition in an action to recover the reasonable value of property received and retained by a city under a contract which it has power to make, but which is invalid for failure to comply with statutory requirements, *held* not demurrable. *Nebraska Telephone Co. v. City of Red Cloud*..... 6
2. A city has power, under sec. 8704 *et seq.*, Ann. St. 1911, to construct and operate a municipal electric light system for the use of the city and its inhabitants. *Bell v. City of David City* 157
3. Under our statutes, a city may use the engines and power of its electric light plant to pump water for the use of the city and its inhabitants. *Bell v. City of David City*..... 157
4. A city, in constructing an electric light plant, must not unnecessarily interfere with the rights of owners of an existing plant; and, if it does, it is liable for any injury sustained. *Bell v. City of David City*..... 157
5. The owners of an electric light plant *held* not entitled to enjoin the construction of a municipal plant, where there was no showing of actual or threatened interference by the city with plaintiff's plant. *Bell v. City of David City*... 157
6. Proposition for municipal electric light bonds *held* to provide for bonds payable in 20 years and redeemable at any time after 5 years from date of issue. *Minden-Edison Light & Power Co. v. City of Minden*..... 161
7. A municipal corporation authorized by statute to create an extraordinary debt by the issuance of negotiable bonds has inherent power to levy taxes to pay the principal and interest of the debt at maturity, unless there is a clear legislative intent to the contrary. *Minden-Edison Light & Power Co. v. City of Minden* 161
8. The grant of a certain electric light franchise *held* not to prevent the city from constructing and operating another electric light system. *Minden-Edison Light & Power Co. v. City of Minden* 161
9. A city of the second class may house the machinery neces-

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- sary to operate its electric light system in the same building with the machinery of its water plant. *Minden-Edison Light & Power Co. v. City of Minden*..... 161
10. The fact that, in the discussion of the proposition to vote electric light bonds, certain persons expressed an opinion that surplus revenues from the operation of the plant could be used to pay the principal and interest on the bonds, held not to render the election void. *Minden-Edison Light & Power Co. v. City of Minden* 161
11. Compliance with sec. 54, art. III, ch. 13, Comp. St. 1911, is essential to the validity of the issuance of bonds for the construction of a municipal lighting plant in cities of from 5,000 to 25,000 inhabitants. *Brownfield v. City of Kearney*, 419
12. Sec. 54, art. III, ch. 13, Comp. St. 1911, relating to the issuance of municipal lighting bonds, having been re-enacted subsequent to secs. 1 and 2, art. V, ch. 14a, Comp. St. 1911, supersedes the latter act in so far as it conflicts therewith. *Brownfield v. City of Kearney*..... 419
13. The power granted to electors of a city to remove public officers is political in its nature, and is not the exercise of any judicial function. *State v. Houston* 445
14. The provision of the statute that a recall petition shall contain a general statement of the grounds upon which the removal is sought does not require the petition to contain specific charges of misconduct; its purpose being to furnish information upon which a political, and not a legal, issue may be raised at the election. *State v. Houston*..... 445
15. Under sec. 36, art. III, ch. 14a, Comp. St. 1911, the city clerk must determine whether the requisite number of qualified signers have signed a petition for a recall election, and his determination is not subject to review, in the absence of fraud or mistake. *State v. Houston*..... 445
16. Where, in the absence of fraud or mistake, a petition for a recall election is regular in form and accompanied by the proper certificate of the city clerk, the city council must convene and fix a date for the election. *State v. Houston*.. 445
17. Within constitutional and statutory limits, the mayor and council of the city of Omaha are the sole judges, under sec. 128, ch. 12a, Comp. St. 1911, as to when and how railroad companies shall construct viaducts over their tracks where they cross public streets at grade. *State v. Union P. R. Co.* 556
18. In construing the validity of an ordinance directing railroad companies to construct a viaduct over tracks which cross a public street at a grade, it will be presumed that the

Municipal Corporations—Continued.

- mayer and council acted with full knowledge of existing conditions. *State v. Union P. R. Co.* 556
19. The city of Omaha, under sec. 128, ch. 12a, Comp. St. 1911, can require railroad companies to construct a viaduct over their tracks, without making provision for closing the street where the tracks cross it at grade. *State v. Union P. R. Co.*, 556
20. Under the statute governing the city of Lincoln (Comp. St. 1905, ch. 13, art. I, sec. 73), an amended ordinance must be read on three different days, unless such reading has been dispensed with by a two-thirds vote of the council; but, if more than two-thirds of the members vote for the amended ordinance, it is a substantial compliance with the statute. *Miller v. City of Lincoln* 577
21. Under the statute governing the city of Lincoln (Comp. St. 1905, ch. 13, art. I, sec. 4), providing that land contiguous to the city and subdivided may by ordinance be included within the city, a lot adjoining a city boulevard held properly included within the city. *Miller v. City of Lincoln*.... 577
22. In an action for injuries from an obstruction on a sidewalk, held that whether the city was negligent in failing to restore the sidewalk to a reasonably safe condition for travel and whether plaintiff was guilty of contributory negligence were questions for the jury. *Gielen v. City of Florence*..... 619
23. A city ordinance, which declared that the carcasses of all dead animals within the city, not slain for food, should become the property of the public contractor, held void, so far as it attempted to take private property without due process of law. *Whelan v. Daniels* 642
24. A municipal ordinance for the removal of carcasses of animals should permit the owner to remove them within a reasonable time, or to put them to a beneficial use. *Whelan v. Daniels* 642
25. The owner of unoccupied territory in a village does not, by signing a petition to vote municipal bonds, estop himself to assert the right to have such territory detached from the village under sec. 101, art. I, ch. 14, Comp. St. 1911. *MacGowan v. Village of Gibbon* 772
26. The judgment in proceedings under sec. 101, art. I, ch. 14, Comp. St. 1911, to detach unoccupied territory from a village will not be reversed, in the absence of a showing of mistake of fact or of law. *MacGowan v. Village of Gibbon*.. 772
27. The silence of the record of a village board is not conclusive evidence of the non-existence of a fact which should be recorded in enacting an ordinance. *Shaw v. Alexander*.... 774
28. The passage of an ordinance may be proved by common

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law methods, unless otherwise provided by statute. *Shaw v. Alexander* 774

29. Payments for street improvements will not be enjoined in a suit by a taxpayer who had knowledge of the progress of the work, though there were irregularities in the letting of the contract or slight defects in the construction. *Nelson v. City of Florence* 847

Negligence. See APPEAL AND ERROR, 19. CARRIERS. MASTER AND SERVANT. RAILROADS.

1. Where there is no evidence of negligence, the question of contributory negligence does not arise. *Wright v. Chicago, R. I. & P. R. Co.*..... 317
2. While it is for the court to say what act or omission of a party is evidence of negligence, it is for the jury to say what conclusion such evidence warrants. *Whitlow v. Missouri P. R. Co.* 649
3. Evidence, in an action for personal injuries, held insufficient to show negligence of defendants. *Hurst v. Hayden Bros.*, 704

Newspapers. See TAXATION, 4.

New Trial. See APPEAL AND ERROR, 12, 14, 42, 50.

1. Where defendant was awarded a new trial for newly discovered evidence on condition that he pay the costs of all new witnesses, such condition was void, and, on judgment in his favor, all the costs were properly taxed against plaintiff. *State v. Ball* 39
2. A new trial would not be granted in an action for personal injuries on account of the smallness of the verdict alone, while sec. 315 of the code was in force. *Blakely v. Omaha & O. B. Street R. Co.* 119

Officers. See ATTORNEY GENERAL.

1. An office created by the legislature may, in the absence of any constitutional restrictions, be abolished by that body; the incumbent having no property interest therein. *State v. Houston* 445
2. In the creation of an office the legislature may impose such conditions as to its continuance and termination as it sees fit, and the incumbent takes it subject to such conditions. *State v. Houston* 445

Parent and Child. See CONSTITUTIONAL LAW, 4-7. HABEAS CORPUS.

1. Collateral heirs of deceased adopting parent held estopped to deny the validity of the adoption proceedings, and that the adopted child is entitled to inherit. *Milligan v. McLaughlin* 171

Parent and Child—Concluded.

2. One not the father of an illegitimate child does not make such child his heir by marrying the child's mother and signing the marriage record which recited that they agreed to take the child as their lawful child. *Van Hove v. Van Hove* 575
3. Where one not the father of an illegitimate child married the child's mother, and sent the child money with which to pay passage from a foreign country, and allowed him to live in the family for a short time, he did not thereby adopt him into the family, within the meaning of sec. 4931, Ann. St. 1911. *Van Hove v. Van Hove*..... 575
4. An agreement to adopt a child, though sufficient to make him an heir, could not prevent a free disposal of the property by deed or will. *Pemberton v. Perrin* 718

Parties. See GARNISHMENT, 3. STATES, 3. WILLS, 10-12.

Partnership.

Evidence held insufficient to show a partnership between defendants. *Hurst v. Hayden Bros.* 704

Physicians and Surgeons. See APPEAL AND ERROR, 35.

Pleading. See APPEAL AND ERROR, 13, 24. INSURANCE, 8. LIMITATION OF ACTIONS, 5. MUNICIPAL CORPORATIONS, 1.

1. A demurrer to a pleading admits only such facts as are well pleaded. *Busboom v. Schmidt* 30
2. By sec. 627 of the code, under a general denial in ejectment defendant may prove an estoppel. *Fitch v. Walsh*..... 32
3. A defendant may plead as many defenses as he has, if consistent, and they will be held to be consistent unless one of them cannot be proved without disproving the other. *Ford & Isbell Lumber Co. v. Cady Lumber Co.*..... 87
4. In an action for the price of lumber, certain allegation held not an admission, and not inconsistent with a general denial. *Ford & Isbell Lumber Co. v. Cady Lumber Co.*..... 87
5. The allowance of an amendment to conform to the evidence is usually within the discretion of the trial court. *Blakeslee v. Van der Slice* 153
6. In an action on a note, it is not prejudicial error to strike all of the answer except an admission of its execution, delivery and non-payment, where no defense, counterclaim or set-off is pleaded. *Meyer Bros. Drug Co. v. Hirsching-Morse Co.* 309
7. In an action on a note, a motion for judgment for plaintiff on the pleadings should be sustained, where the answer admits execution, delivery and nonpayment, and no defense,

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- counterclaim or set-off is pleaded. *Meyer Bros. Drug Co. v. Hirsching-Morse Co.* 309
- 3. Where a pleader makes inconsistent allegations, he is bound by those most favorable to his opponent. *Bryant v. Modern Woodmen of America* 330
- 9. State courts will take judicial notice of the existence of a treaty, and if its provisions are self-executing it is unnecessary to plead its existence. *Butschkowski v. Brecks*..... 532

Principal and Agent. See MORTGAGES, 3.

- 1. Evidence held to show that an agent had no authority to purchase mortgaged property in his own name and obligate his principal to release the security thereon. *Walker v. Hokom* 399
- 2. Where one has placed his agent for investments in notes and mortgages in such a situation that persons are justified in regarding him as having full authority to make collections, payment to the agent will be payment to the principal. *Berkley v. Stewart* 550
- 3. In an action by the principal against an agent for fraud, the agent cannot defend on the ground that his contract of agency was void because not in writing, as required by sec. 74, ch. 73, Comp. St. 1911. *Maul v. Cole*..... 714
- 4. Where an agent by misrepresentations prevents an exchange of the principal's property to his damage, in an action for fraud, the agent cannot defend on the ground that a tenant's parol agreement to transfer his lease was voidable; though the exchange depended on its transfer. *Maul v. Cole*, 714

Process. See INSURANCE, 7. TAXATION, 9, 14, 15.

- 1. The purpose of an affidavit for publication of notice to a nonresident defendant is to enable the court to determine whether the action is one in which jurisdiction may be acquired by such notice. *Armstrong v. Bates*..... 462
- 2. A notice to a nonresident defendant in a tax foreclosure suit published in a weekly newspaper for four consecutive weeks, beginning February 8 and ending March 1, held sufficient under sec. 79 of the code. *Armstrong v. Bates*.... 462

Quieting Title. See JUDGMENT, 1.

Quo Warranto.

Where a corporation, delinquent in the payment of an occupation fee, as provided in sec. 4260, Ann. St. 1911, pays the fee and penalty demanded by the secretary of state, the fact that the corporation paid a less sum than the required fee will not, in the absence of a demand for the remainder and

Quo Warranto—Concluded.

- a refusal, authorize ouster of the corporation. *State v. Sperry & Hutchinson Co.* 785

Railroads. See MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 17-19.

1. It is negligence for a railroad company to construct its embankment in such a manner as to obstruct a natural waterway and thereby divert surface waters upon the lands of others. *Iske v. Missouri P. R. Co.* 9
2. A landowner may recover damages against a railroad company for negligently maintaining an insufficient culvert, whereby his lands are flooded, though he may have recovered damages for the location of the road. *Iske v. Missouri P. R. Co.* 9
3. In an action against a railroad company for injury to property at a crossing, held that whether the company was negligent was a question for the jury. *Whitlow v. Missouri P. R. Co.* 649
4. Where, in an action for the value of a horse, the evidence is conflicting, the issue of negligence should be submitted to the jury. *Birdsall v. Chicago & N. W. R. Co.* 691

Remainders. See LIFE ESTATES. LIMITATION OF ACTIONS, 3.**Replevin.**

1. Mere delay during three winter months in complying with a judgment requiring the return of a replevied threshing outfit, held not to justify the owner's refusal to accept it when returned. *Wallace v. Cox* 194
2. Where defendant in replevin, after judgment for a return of the property, refuses to accept it on the sole ground that it was damaged while unlawfully detained, his refusal cannot afterward be justified because the return was delayed for three months. *Wallace v. Cox* 194
3. Deterioration in the value of replevied property while unlawfully detained does not justify the owner in refusing to accept it, when returned in due time pursuant to a judgment in replevin; his remedy being an action on the replevin bond. *Wallace v. Cox* 194
4. It is plaintiff's duty in replevin to produce evidence of his title in his case in chief, and the court in its discretion may exclude such evidence on rebuttal. *Mutz v. Sanderson*..... 293
5. In replevin, the wrongful detention of the property and plaintiff's right to possession constitute the gist of the action. *Crancer Co. v. Combs* 655
6. Where, in replevin, the evidence showed conclusively that a sufficient demand had been made, an instruction that proof

Replevin—Concluded.

of a demand was necessary, if error, was not prejudicial.
Crancer Co. v. Combs 655

Sales. See APPEAL AND ERROR, 64. EXECUTION, 1, 2.

1. Where a manufacturer sells goods to a retail dealer on condition that the buyer may return any goods not entirely satisfactory, the buyer does not waive the condition by retaining the goods for a reasonable time in an effort to dispose of them. *Cohn-Goodman Co. v. Mandelson & Goldstein* 47
2. Where the local agent of a corporation submitted a contract signed by him and a buyer to the general sales manager, and the latter telegraphed the home office to ship a part of the goods, the shipment and the receipt of the goods by the buyer constituted an acceptance of the contract, and the corporation was liable for failure to deliver the remainder of the goods; and the fact that the corporation at the time the goods were shipped had no knowledge that other goods were included in the contract will not relieve it from liability. *Monarch Portland Cement Co. v. Creedon & Sons*... 185
3. Evidence held to establish the ratification of a written contract by a sales manager of a corporation. *Monarch Portland Cement Co. v. Creedon & Sons*..... 185
4. A bill of sale which described the property as all the furniture in all the rooms, except room No. 10, and except one carpet and one bed, held to reserve all the furniture in room No. 10, and also a carpet and bed. *Damron v. Nobles*..... 527
5. Where a buyer returned the goods as damaged, and telegraphed the seller to "cut the order in two" and fill it with different goods, which direction was complied with, held that the buyer could not be required to receive and pay for the goods originally ordered. *Kimball-Mathews Co. v. Tucker* 632

Specific Performance. See VENDOR AND PURCHASER, 8.

A contract for the exchange of a tract of land, including a homestead, which is void as to the homestead, will not be enforced. *Anderson v. Schertz* 390

States. See STATUTES, 1.

1. Employment of an attorney in special cases relating to the duties of the board of educational lands and funds is lodged with the board itself, and not with any member thereof. *Follmer v. State* 217
2. Where the commissioner of public lands and buildings, as a member of the board of educational lands and funds, employed an attorney, who, with the board's knowledge, ren-

States—Concluded.

dered valuable services, in a suit against the state for his services, *held* that the fact that he was not formally employed by the board was immaterial. *Follmer v. State*..... 217

3. Action against the state by the commissioner of public lands and buildings for attorney's fees for services rendered the board of educational lands and funds *held* properly brought in the name of the commissioner as assignee of the claim. *Follmer v. State* 217

Statute of Frauds.

There must be a consideration for a modification of a contract required by the statute of frauds to be in writing, or else the new agreement must be in writing. *Lincoln Realty Co. v. Garden City Land & Immigration Co.*..... 346

Statutes.

1. The singular number often includes the plural in the constructions of statutes, and "chief officer," as used in sec. 4778, Ann. St. 1911, is so construed. *Follmer v. State*..... 217
2. Sec. 128, ch. 12a, Comp. St. 1911, authorizing the city of Omaha to require railroad companies to construct viaducts above their tracks at street crossings, *held* a valid exercise of police power. *State v. Union P. R. Co.*..... 556

Street Railways.

A pedestrian should look before crossing parallel street railway tracks, and if there is an obstruction to his view he should use additional care. *Blakely v. Omaha & O. B. Street R. Co.* 119

Taxation. See CONSTITUTIONAL LAW, 2. MUNICIPAL CORPORATIONS, 7. PROCESS. WATERS, 7-9.

1. Where land conveyed by warranty deed was quitclaimed by the grantee to one who had purchased the land at a tax foreclosure sale, *held* that the original grantor was not entitled to redeem from the foreclosure sale on the ground that the original conveyance created a resulting trust. *Farrell v. Dietrich* 136
2. Notice of expiration of time for redemption from tax sale must be served on the person in whose name the land was assessed; and there must be personal service, or a showing that such service cannot be had. *Howell v. Jordan*..... 264
3. Tender by the owner to the county treasurer of an amount sufficient to redeem the land from tax sale, and its refusal, is a sufficient compliance with the statute to enable the owner to sue to redeem. *Howell v. Jordan*..... 264
4. An order of a county board awarding the printing of the scavenger delinquent tax list to a certain newspaper *held*

Taxation—Continued.

- not a designation of such newspaper as the one in which subsequent notices in the same suit should be published. *Cronin v. Cronin* 353
6. All delinquent taxes must be included in a sale of land for taxes. *Wight v. McGuigan* 358
6. Real estate cannot be sold for taxes at private sale unless all delinquent taxes thereon have been included in the notice of public sale, and the land has been offered at such public sale and not sold for want of bidders. *Wight v. McGuigan* 358
7. Where a part of a tax levy is void, a sale thereunder is voidable. *Wight v. McGuigan* 358
8. A *bona fide* purchaser of land at private tax sale acquires the lien of the public though the sale is voidable. *Wight v. McGuigan* 358
9. The district court is without jurisdiction to render a default decree foreclosing a tax lien upon service by publication only, where the notice was published only seven times in a semi-weekly newspaper. *Davies v. America Investment & Trust Co.* 427
10. The payment of all delinquent taxes, both before and subsequent to the entry of a void tax foreclosure decree, with interest and penalties, where the land is unimproved, will entitle the owner to redeem. *Davies v. American Investment & Trust Co.* 427
11. Under art. IX, ch. 77, Comp. St. 1903, the district court has power to vacate a decree rendered by default which contains void taxes, and enter a valid decree, at any time before final confirmation of sale. *State v. Several Parcels of Land* 431
12. In order to redeem land sold for taxes under art. IX, ch. 77, Comp. St. 1903, the owner must pay the amount of the decree with interest at the rate provided for in the statute. *State v. Several Parcels of Land* 431
13. A description of two 40-acre tracts as "NW¹ SE¹ and SW¹ NE¹," in a petition against a nonresident to foreclose tax liens, *held* sufficient as against collateral attack, where the state, range, county, township and section were definitely stated. *Armstrong v. Bates* 462
14. In a suit to foreclose a tax lien based on service by publication, there must be strict compliance with the statute; and, if the notice is insufficient, a sale thereunder will be considered void in a suit to redeem. *Armstrong v. Griffith*.... 515
15. Where notice by publication was not addressed to the defendant, and the title of the case and the court were not set

Taxation—Concluded.

- forth, and it was not stated that a petition had been filed, the service is insufficient. *Armstrong v. Griffith*..... 515
16. Where plaintiff had conveyed part of a tract of land to the city, and an assessment was made against the entire tract, so that it was impossible to ascertain the portion chargeable against plaintiff's land, the assessment was void. *Miller v. City of Lincoln* 577
17. The state may make the ownership of property subject to taxation relate to any day of the year; and the selection of a particular day for returns of assessment does not preclude the making of assessments as of other periods of the year. *Courtright v. Dodge County* 669
18. Sec. 37, art I, ch. 77, Comp. St. 1911, requires the assessor to list for taxation property brought into the state after April 1 and before July 1, and found in the owner's possession; and the owner, in order to escape taxation thereon, must show that the property has been listed elsewhere, or received in exchange for money or property listed for taxation during that year. *Courtright v. Dodge County*..... 669
19. The owner's affidavit that he did not, on April 1, own the property assessed, and did not bring it into the state after that date, is insufficient to authorize striking such property from the assessment roll. *Courtright v. Dodge County*..... 669
20. Where, in a suit to redeem from a tax foreclosure sale, the petition failed to describe a portion of the land, and an amended petition was filed after the time for redemption had expired, held that the filing of original petition, the tender of the redemption money, and the answer defending as to the whole tract preserved the right to redeem the entire tract. *Brady v. McGinley*..... 761
21. To redeem from a valid tax foreclosure sale to a person other than the plaintiff, the owner must pay the purchaser the amount of his bid with 12 per cent. interest. *Brady v. McGinley* 761
- Trial.** See ADVERSE POSSESSION, 3. **APPEAL AND ERROR.** BILLS AND NOTES, 1. CARRIERS, 3. **CRIMINAL LAW.** HIGHWAYS, 3. INSURANCE, 5. LIBEL, 6. MASTER AND SERVANT, 2, 6, 7. MUNICIPAL CORPORATIONS, 22. NEGLIGENCE, 2. NEW TRIAL. RAILROADS, 3, 4. REPLEVIN, 4, 6.
1. Where the issue is fairly presented in a proper instruction, the judgment will not be reversed because the same issue was defectively stated in another instruction, unless prejudice is affirmatively shown. *York & Co. v. Boomer*..... 62
2. A verdict for plaintiff, in a suit to annul a contract for fraud, will not be set aside because the trial court with-

Trial—Concluded.

- draws a part of his cause of action from the jury, where sufficient remains to justify the verdict. *York & Co. v. Boomer*62
3. An instruction requiring the party on whom the burden of proof rests to "satisfy" the jury upon an issue of fact by a preponderance of the evidence is not ground for reversal where prejudice is not shown. *Whitney v. Broeder*..... 305
4. Instruction as to amount of recovery approved. *Mack v. Mack* 504
5. Direction of verdict for plaintiff *held* proper, where the evidence sustained plaintiff's cause of action, and was insufficient to sustain the only defense pleaded. *Emerson-Brantingham Co. v. McNair* 553
6. Instructions in an action on account *held* to correctly state the issues, and to be without reversible error. *Kearns v. Blum* 663
7. Motion to dismiss when plaintiff rests does not preclude defendant, after the motion is overruled, from making his defense. *Adams v. Seeley* 243

Trusts. See TAXATION, 1. WILLS, 2.

1. In a suit to recover land on the ground that a conveyance thereof created a resulting trust, evidence *held* to show a ratification of the conveyance by the grantor, and that plaintiff was not entitled to recover the land more than 16 years thereafter. *Farrell v. Dietrich* 136
2. The statute of limitations does not run against a *cestui que trust* after becoming of age until he has notice that the trustee denies his right to the property. *Goodman v. Smith*, 227
3. When property of an infant is sold and the proceeds invested in other property, and the title is taken in the name of another, a resulting trust arises in favor of the infant. *Goodman v. Smith*..... 227

Vendor and Purchaser. See LANDLORD AND TENANT, 2-4.

1. Where a purchaser tenders final payment at the time agreed upon, and the vendor is not able to transfer title, the purchaser may rescind and recover the money paid. *Rushton v. Campbell* 141
2. Where one of three owners makes false representations as to the title and quality of land, whereby plaintiff is induced to purchase it and to make payment thereon, all the owners are jointly liable for the money so paid. *Rushton v. Campbell* 141
3. Where a contract for the sale of land requires payment to be made at a certain time, but does not specify when the title

Vendor and Purchaser—Concluded.

- shall be transferred, the law implies that the payment and conveyance shall be concurrent acts. *Rushton v. Campbell*, 141
4. A *bona fide* purchaser from the holder of the legal title, without actual notice of any adverse claims, need not take notice of a judgment against a prior holder of the legal title entered after such prior owner had conveyed the land. *First Nat. Bank v. Spelts*..... 387
 5. A valid contract for the sale of land may be made by exchange of letters. *Dengler v. Fowler*..... 621
 6. A purchaser of land in possession of a tenant *held* bound by all equities enforceable by the tenant against the vendor. *Dengler v. Fowler* 621
 7. The notice imparted by a recorded lease does not relieve a purchaser from the necessity to inquiry as to the rights of a tenant in possession of the demised premises and conducting a store in buildings erected thereon at his own expense. *Dengler v. Fowler* 621
 8. Purchasers of land, with notice that a lessee in possession has an option to purchase at the expiration of his lease, may be required to perform lessor's agreement to convey to lessee. *Dengler v. Fowler* 621
 9. False representations by vendor *held* to justify rescission of a contract by vendee who relied upon them and never saw the land. *Howard v. Duncan*..... 683
 10. The purchaser of real estate, with knowledge of his grantor's rights therein, takes only those rights. *Thuresson v. Seifert* 823

Venue.

- Where a suit was instituted against three defendants, one of whom resided in the county, a finding that all were jointly liable fixed the jurisdiction over those residing in another county. *Rushton v. Campbell* 141

Waters. See RAILROADS, 1, 2.

1. A landowner may rely on the belief that an adjoining proprietor will not wrongfully divert flood waters upon his premises, and need not anticipate such wrongful action by digging a ditch before a flood comes, or by cleaning out one already constructed. *Iske v. Missouri P. R. Co.*..... 9
2. Void bonds of an irrigation district issued to pay for excavating a canal may be canceled without requiring the district to pay the holders of the bonds the reasonable value of services performed, where the contract was in violation of statute, and resulted in no benefit to the district. *Par-ton Irrigation District v. Conway*..... 205

Waters—Continued.

3. Bonds of an irrigation district, issued in violation of mandatory legislation that they shall be signed by the secretary of the district, sealed, and paid in instalments maturing at different times, and shall be numbered consecutively as issued, bearing date from time of issuance, are void. *Paxton Irrigation District v. Conway*..... 205
4. An irrigation district, by paying interest on void bonds with taxes levied for that purpose, does not thereby estop itself from assailing them as illegal. *Paxton Irrigation District v. Conway* 205
5. An order in a statutory proceeding confirming the preliminary steps to the issuance of bonds of an irrigation district does not affect a subsequent, unlawful negotiation or transfer of the bonds. *Paxton Irrigation District v. Conway* 205
6. A person who contracts to purchase bonds of an irrigation district and to excavate a canal in exchange therefor must take notice of the statute governing the district and the limitations of its officers. *Paxton Irrigation District v. Conway* 205
7. The county board may levy taxes for costs of organization and payment of bonds of an irrigation district when the district board neglects to do so, but the district board alone can levy a tax for the general purposes of the district. *Wight v. McGuigan* 358
8. Where the provisions of sec. 16, ch. 70, laws 1895, in reference to assessments of irrigation districts, have been substantially complied with and the district board has reviewed the assessment and a levy has been made, it will be presumed, in a suit to cancel the tax, that the district board made the levy. *Wight v. McGuigan*..... 358
9. Under sec. 49, ch. 70, laws 1895, land incapable of irrigation cannot be included in an irrigation district or taxed for irrigation purposes, but comparatively small knolls or sloughs on a tract of land will not necessarily require its exclusion, and the tract should be assessed as a whole. *Wight v. McGuigan* 358
10. "Appropriation" as used in the irrigation statutes of Nebraska (Comp. St. 1911, ch. 93a) defined. *Commonwealth Power Co. v. State Board of Irrigation*..... 613
11. Where a grant of the use of all the unappropriated water in a stream was in force, a subsequent application for the same water held properly denied. *Commonwealth Power Co. v. State Board of Irrigation*..... 613
12. Under sec. 8a, art. II, ch. 93a, Comp. St. 1911, it is the im-

Waters—Concluded.

perative duty of the secretary of the state board of irrigation, highways and drainage to pay the fees for filing for water to the state treasurer, and no right can be predicated against the board by reason of the secretary complying with the statute. *Commonwealth Power Co. v. State Board of Irrigation* 613

Wills. See EXECUTORS AND ADMINISTRATORS, 1.

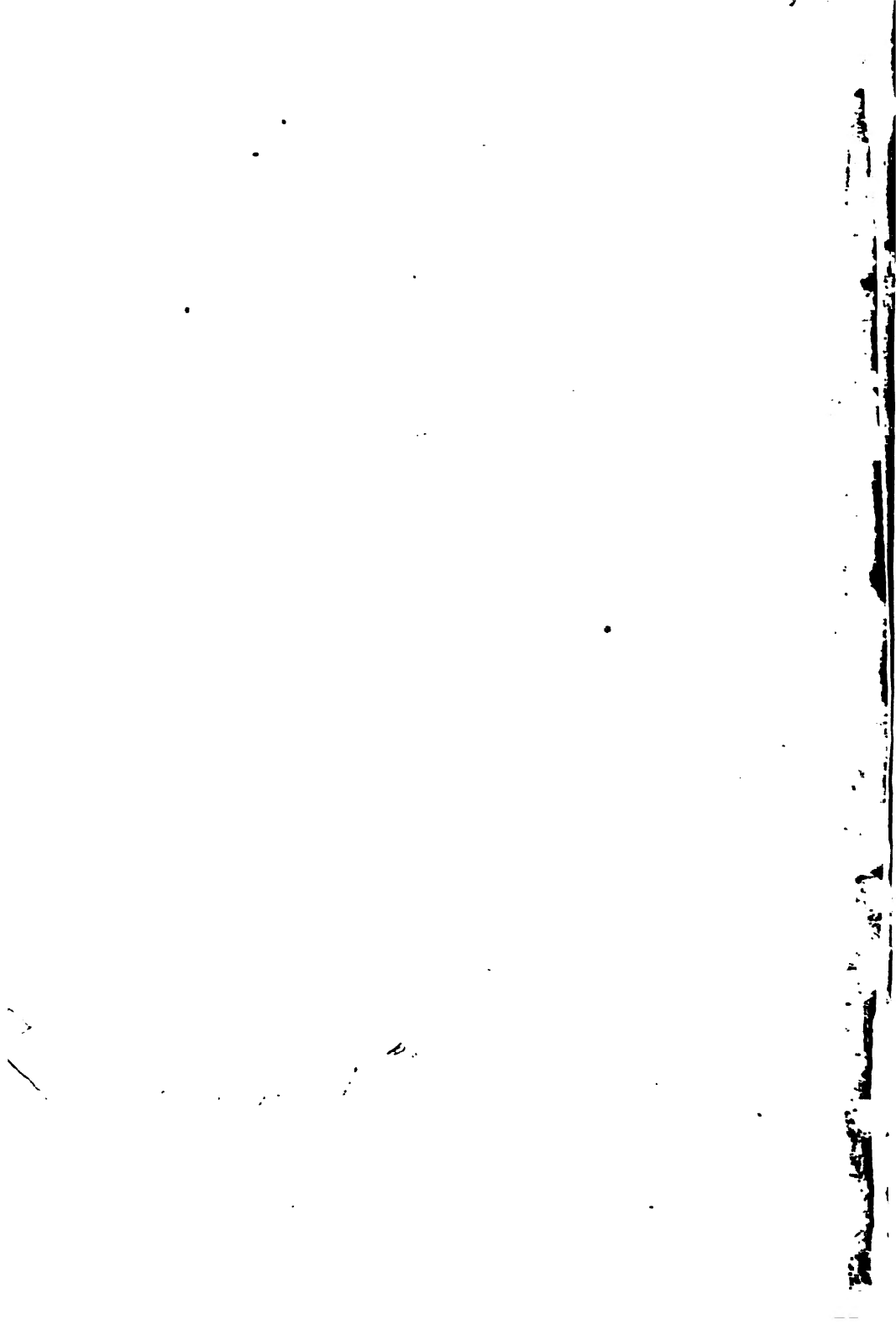
1. A gift by will of the income of certain shares of bank stock to the "First Congregational Church Society" held a donation to a public charity. *In re Estate of Douglass*..... 280
2. Officers of a bank, designated in a will as trustees to hold title to stock of the bank bequeathed to a church, are not disqualified to act as such trustees. *In re Estate of Douglass* 280
3. A gift by will of a house and lots to a church society so long as it is used for a parsonage is a donation to a public charity, and vests the society with a base fee to the property. *In re Estate of Douglass*..... 280
4. An allegation that mistake of inserting 9 instead of 10 as the number of the range of land devised was the mistake of the scrivener is sustained by evidence that the wrong number was induced by oversight of the testatrix. *Pemberton v. Perrin* 718
5. A will describing the devisee as "my nephew John Conrod, of Coldwater," sufficiently identifies John Conrod Swart, who resided at Coldwater when the will was made, and was the only nephew of testatrix residing there. *Pemberton v. Perrin* 718
6. Where a will described land devised as in range 9, parol evidence that testatrix owned land in range 10 otherwise answering the description, and no other land, held admissible to show that the land was described as in range 9 by mistake. *Pemberton v. Perrin* 718
7. A will devising the use of real estate on which testator holds a mortgage will pass his interest as mortgagee. *Batley v. Batley* 729
8. To authorize probate of a copy of a will 19 years after the original will was executed, the proponent must show what became of the original will, in whose custody it was placed, account for its nonproduction, and produce competent proof of its contents. *In re Estate of Francis*..... 742
9. Evidence held not to show that testatrix was unduly influenced in the execution of her will. *In re Estate of Kuman* 783

Wills—Concluded.

10. Every person interested is a party to a probate proceeding to settle distribution of an estate under a will. *In re Estate of Sweeney* 834
11. Where, in a proceeding for distribution, A asks for an order excluding B from participation in the assets, he cannot afterwards object to B's appearance to protect his interest upon appeal in the district court. *In re Estate of Sweeney*, 834
12. An appeal from an order denying probate of a will removes the whole case to the district court, and all parties interested are entitled to be heard in the appellate court. *In re Estate of Sweeney* 834
13. On appeal to the district court from an order denying probate of a will, the burden rests on proponents to prove its due execution and testamentary capacity. *In re Estate of Sweeney* 834
14. Evidence held to establish lack of testamentary capacity. *In re Estate of Sweeney*..... 834

Witnesses. See INTOXICATING LIQUORS, 1.

1. The cross-examination of a witness should be restricted to the facts and circumstances in his direct examination. *Easton v. Snyder-Trimble Co.*..... 18
2. It is not error to confine cross-examination to matters drawn out on direct examination. *Mutz v. Sanderson*..... 293





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